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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 463

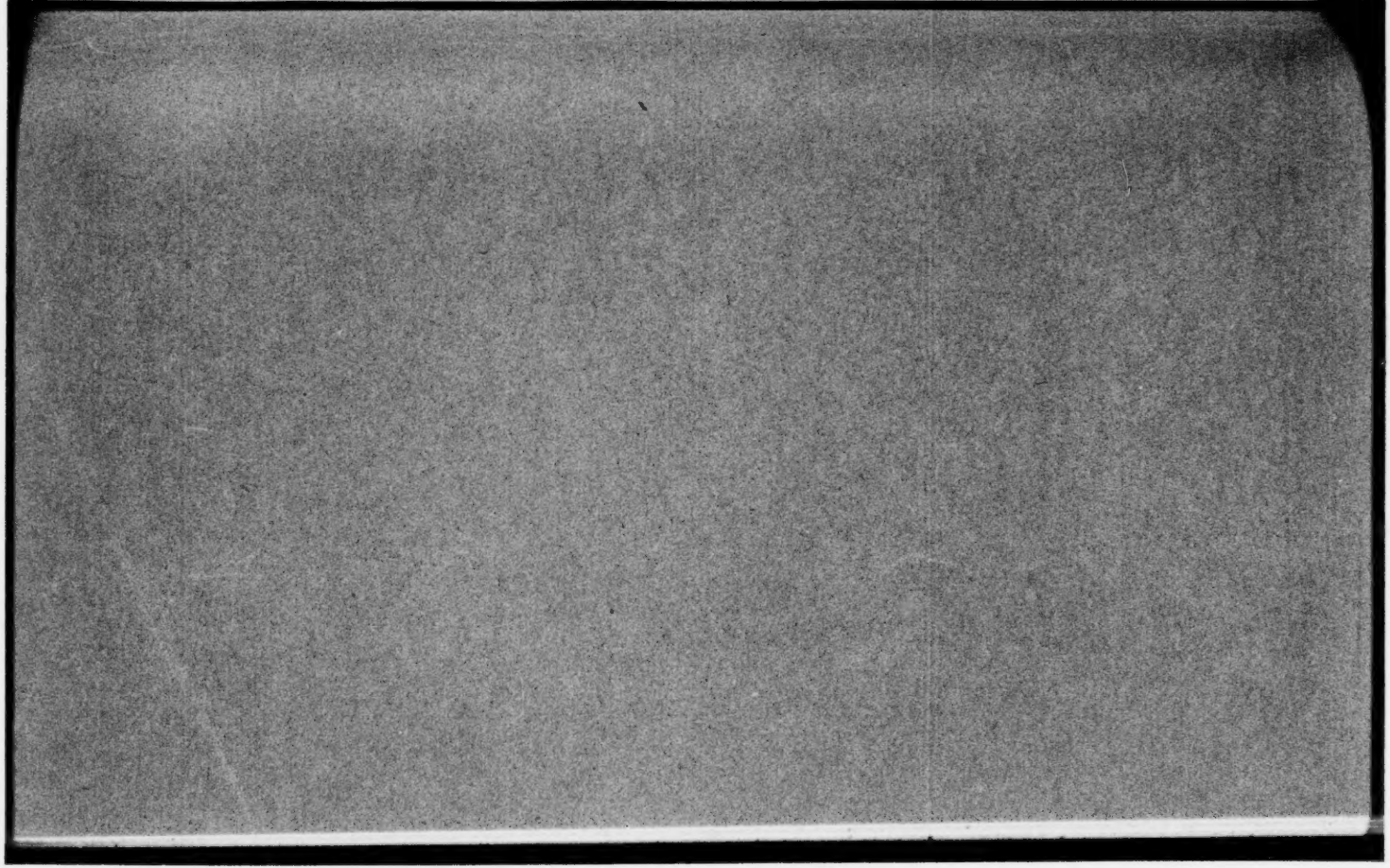
ALEX RANIERI, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED OCTOBER 12, 1942



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1942.

—2793

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 42851

ALEX RANIERI

vs.

THE UNITED STATES

I. PETITION—Filed November 23, 1934

To the Honorable, the Court of Claims:

The claimant respectfully represents,—

1. During all the times herein mentioned he was engaged in the business of a general contractor.

2. That on the 25th day of August, 1931, the Corps of Engineers of the United States Army, by authority of the Secretary of War, caused to be published in the newspapers printed and circulated in the city of New Orleans, Louisiana, and other cities of the United States, an invitation for bids for constructing approximately 13,820,000 cubic yards of levee work on the Mississippi River, in the Second New Orleans District.

3. Claimant, being desirous of bidding upon said work, applied to the office of the District Engineer, in New Orleans, as suggested in the advertisement, for information [fol. 2] as to the nature of the levee work to be done and the terms and conditions under which it would have to be undertaken.

4. Thereupon claimant was furnished by Lieutenant Colonel J. N. Hodges, (who, and his successors, will hereafter be referred to as the "contracting officer"), with the specifications for the levee work in question which had been prepared by the Government and were on file in the contracting officer's office in New Orleans, and was notified that all bids would have to be based upon these specifications. A copy of these specifications is hereto annexed and marked exhibit "a".

5. Upon examining these specifications, claimant determined to bid for the work in the section designated in para-

graphs 1 and 39 of the Specifications, and therein described as Item R831, Chamberlain-Lobdell Levee, Lots A, B, C and D.

6. The quantity of dirt to be excavated from borrow pits and built into a levee was stated in said paragraph 39 to be 2,950,000 cubic yards.

7. To enable claimant to form an intelligent judgment as to the price he could afford to bid for doing said levee work, it was necessary for him to know the character of the material to be used in constructing said levee.

8. Claimant had no knowledge or information as to the character of this material and owing to the large volume thereof to be excavated and built into a levee, and the extended area from which the material was to be taken, and the fact that all bids were required to be submitted within thirty days from the date of the advertisement, it was impossible for claimant to make such an examination of the character of the material in the area from which the soil [fol. 3] was to be excavated, (which area was known and designated as borrow pits) as would have enabled him to ascertain for himself its character, as the Government well knew.

9. For information on this subject, claimant was referred by the contracting officer to paragraph 19 of the specifications, wherein was made the statement that the governing material in said borrow pits and to be excavated was "Loam".

10. Claimant understood from these specifications that,—(a) The United States, (hereinafter referred to as the "Government"), intended to warrant the governing, prevalent material to be excavated and used in said construction to be loam; that (b) The Government believed that such was the character of the material that it had information in its possession sufficient in its opinion to justify such a belief; and that (c) Included in that information was the knowledge furnished by the specimens of the material which had been obtained by test borings made by the Government in the usual way for the purpose of ascertaining in the most direct and certain manner the character of the material.

11. Because claimant knew that the Government had been having levee work done in that vicinity on both sides of

the Mississippi River for a long time prior to the date of said advertisement, and that it had had ample opportunity for and the means of making itself acquainted with the real character of the material in said borrow pits, and that, therefore, if the Government believed the governing or prevalent material to be removed from the area in question to be loam, there was very little likelihood that the material was other than what the Government believed it to be, and little risk involved in assuming that the Govern-
[fol. 4] ment's belief was well founded, and because he relied on said representation and warranty so made by the Government and on its conclusion as to what was shown by its said borings, which was so embodied in said specifications, claimant made his bid for said work.

12. That claimant would not have made his bid for said work except for said representation and warranty by the Government that the governing or prevalent material to be excavated and used for said construction was loam.

13. Claimant's bid was submitted within the time limited by the advertisement, that is to say, within thirty days from the date of said advertisement, in writing, with the guarantee required by the specifications, and said bid was accepted.

14. Thereafter, to wit, on the 12th day of October, 1931, claimant entered into a contract, (as contemplated by said specifications), with the Government, acting by and through said Lieutenant Colonel J. N. Hodges, the contracting officer, for excavating said earth and moving it into and construction said levee, as provided in said specifications, a copy of which contract is annexed to this Petition and marked Exhibit "b".

15. That the contracting officer and the officials in the office of the Chief of Engineers now admit that the borings made by them do not show that the governing, prevalent or predominant material to be excavated, moved and built into a levee was loam, nor do they claim that the borings show that the governing or prevalent material was what it was in fact found to be as the material was being excavated, but they claim that the borings show that the material to be excavated contained an admixture of clay.

[fol. 5] 16. With his plant and equipment, claimant could easily have completed the excavation of the 2,950,000 cubic

yards of soil from said borrow pits and placed the same into and constructed a levee as and in the time contemplated by the contract, if the governing or prevalent material to be removed had been loam, but the material which was found to be in the borrow pits could not be excavated and built into a levee at all at the slope or to gross grade, or in accordance with the specifications; nor could the material be excavated and built into a levee at a less slope and without constructing to gross grade except at a cost far beyond that at which claimant bid for and obtained said contact, if at all.

17. Claimant began work under said contract at the point designated by the Government's engineer.

18. From the very beginning of the work, the governing or prevalent material encountered by claimant was not loam, but as the work proceeded, the contractor found that, while there was some loam for a depth of about four feet, below that the dirt consisted of an admixture of clay, organic matter, sand and slit, all heavily impregnated with water, and with the stumps of a cypress swamp scattered throughout the area thickly enough to seriously interfere with the work; the soil was found to be interspersed with underground water, seeping through it at frequent intervals; and the organic matter readily and quickly absorbed moisture, spreading it through the soil and holding it, making the drying out on exposure to sun and wind difficult and almost impossible.

A crevass- occurred in the area covered by the borrow pits preceding the Civil War, about 6300 feet wide, which was not filled until 1866, and it is a recognized engineering fact that wherever a crevass- has occurred, difficult conditions [fol. 6] are certain to be encountered in the use of the soil for levee building: there will be greater subsidence, a wider berme is necessary, and excavation in the borrow pits is impossible to the usual depth. A levee cannot be constructed on the site of a crevass- in the usual manner, but all of these unusual precautions must be taken.

Among the difficulties encountered with the soil as found, none of which would have been encountered in loam, are the following,—(1) It was impossible to fill the dipper over a cypress stump, and as often as one was encountered, the dipper had to be lifted and again lowered for filling; (2) Striking of a cypress stump by the dipper at times resulted

in clogging it in the stump, and at times in damage to the dipper or its attachments; (3) As the soil was heavily charged with water,—in large portions of the work to the extent of 35%,—the water which was raised was just so much loss,—it was not dirt; (4) The soil was heavy and slippery, making it difficult to fill the dipper at all, and much more to fill it to capacity, whereas loam is a "nice, friable, workable soil".

19. That the specifications for the construction of levees were, as the result of the experience of the Government, divided into three classes for the three kinds of material which the Government had found in its Mississippi River levee work, the crown, the riverside slope and the landside slope being different according to the governing material of 75% or more buckshot, or loam, or 75% or more of sand; that the construction specifications for loam would not answer for the material which was found in the borrow pits provided for claimant, and the construction of said levee with the material found, according to the specifications for construction with loam, was far more difficult and expensive [fol. 7] than with loam, and required a much longer time than allowed by the contract, but, none the less, and after the Government officials knew that the material in said borrow pits was not loam, but of the kind above described, they insisted and required that said levee be constructed according to the specifications where loam is found.

20. While claimant discovered shortly after starting the work that the material to be excavated was entirely different from that which it was warranted to be by the specifications, he was not aware and did not discover until after the cessation of the work on this contract that at the time the Government invited bids for this work upon said specifications containing the warranty that the governing or prevalent material to be excavated and built into a levee was loam, that the test borings which had been made over the area to be excavated did not show that the governing material to be excavated was loam, but on the contrary it showed such material to be a different material and one much more difficult and far more expensive to excavate and to build into a levee.

21. That claimant, soon after discovering that the material to be excavated was not loam, made repeated requests to the contracting officer, and asked for redress.

22. And claimant further says that the statement on the part of the Government in said specifications that the governing or prevalent material to be excavated and built into a levee was loam was not true and that the contracting officer had no evidence before him to show that the governing material was loam.

23. Claimant further says that by reason of said misrepresentations contained in said specifications and upon said drawings, he was misled into making a bid for the [fol. 8] doing of said work which was much lower than he would ever have made but for said representations, and into the making of a contract at a price totally inadequate for the work to be done.

24. That after claimant had found the material and the conditions in the borrow pits to be of the kind and as above described, and that said levee, if it could be constructed at all, could be so constructed only at a very much greater cost than if said material and conditions had been as described in the specifications, and that it would take a much longer time than allowed in the specifications and contract, and that it was impracticable, if not impossible, with the material and conditions as found, to construct said levee as required by the specifications and after claimant had made repeated requests to the contracting officer for relief and redress, and the same had been denied, and on the contrary said contracting officer had required that said levee be constructed exactly in accordance with the specifications and within the time limited thereby, and on the 12th day of December, 1932, claimant served a written notice on the Government that he rescinded his contract, and that the same was thereby rescinded.

25. By reason of the soil being clay, organic matter, water and silt, with the stumps of a cypress swamp scattered over the borrow pits area, with percolating water under the surface, and said area being the site of a crevass, instead of loam as warranted by the specifications, the following damages were sustained.

a.) The subsidence of the levee as shown by actual test amounted to 2.2 feet, and this would amount to approximately 100,000 yards, which means that claimant carried that quantity which was useless for levee purposes, instead [fol. 9] of the loam which he was warranted he would find.

The loss on carrying alone, at the fair price of 20c would amount to $20,000.00

b.) Slides of 250,000 cubic yards occurred, which the contractor was obliged to move two additional times. These two additional movings at one-half the price for the original moving, or 10c per yard for each moving, and 20c together made a cost of 50,000.00

c.) Because the contractor was unable to move as much as 20 per cent. of the material comprised in sections, there was no estimate or allowance for 54,979 cubic yards moved by him, which at 20c per yard would amount to 10,995.80

d.) Between October 25 and December 12, the claimant placed 75,000 cubic yards for which no estimate or allowance has been made, amounting to 15,000.00

e.) The Government estimated that claimant had placed 1,308,889 cubic yards, and allowed him for that amount at the contract price, but there should be an additional allowance made him of the difference between 12.4c and 20c, amounting to 7.6c, and in the aggregate to 99,475.56

f.) The retained percentages, aside from interest, which should be added, amount to 63,409.13

The total of the above items is the sum of ... $258,880.49

for which amount claimant demands judgment.

[fol. 10] No other action than as aforesaid has been had on this claim, in Congress or by any of the Departments.

No person or corporation other than claimant has any interest in this claim.

And no assignment or transfer of this claim or any part thereof or interest therein has been made.

Claimant is justly entitled to the amount herein claimed from the United States, after allowing all just claims and offsets. Claimant has at all times borne true allegiance to the Government and has not in any way falsely aided, abetted or given encouragement to rebellion against said Government.

And claimant believes the facts stated in this Petition to be true.

And claimant prays judgment for $258,880.49.

S. Wallace Dempsey, Attorney for Claimant, 721-723 Investment Bldg., Washington, D. C.

[fols. 11-12] *Duly sworn to by Alex Ranieri. Jurat omitted in printing.*

II. General Traverse—Filed January 12, 1935

And now comes the attorney General, on behalf of the United States, and ans-ering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

George C. Sweeney, Assistant Attorney General.

ETF.

[fol. 13] III. Defendant's Special Answer and Counterclaim—Filed July 16, 1935, by Leave of Court

Comes now the defendant, by its Assistant Attorney General, and, by leave of the Court first had and obtained and without waiving any of the defenses interposed or interposable under the general traverse heretofore pleaded, files this its special answer and counterclaim and set-off herein and shows unto the Court:

I

That the defendant admits that the plaintiff and the defendant entered into a contract dated October 12th, 1931, for the construction of Item R. 831, Chamberlain-Lobdell Levee, Lots A, B, C, & D, containing approximately two million nine hundred fifty thousand (2,950,000) cubic yards, situated in the Atchafalaya Front Levee District; that this contract is described in plaintiff's petition and a copy of it is annexed to the petition and marked "Exhibit b"; the said contract being number W 1096 eng-1929.

[fol. 14]

II

That the time fixed for completion of the levee construction under this contract was four hundred and fifty (450) days from the date of the receipt by the contractor of no-

tice to proceed; that the contractor received his copy of the contract and notice to proceed on October 30, 1931, thus fixing January 22, 1933, as the date set by the terms of the contract for completion; that on November 16, 1931, the contractor technically complied with the requirement of the contract by commencing work on Lot A, but thereafter delayed actual commencement of construction on Lot A for one hundred (100) days, on Lot B for two hundred and twenty-seven (227) days, on Lot D for two hundred and ninety-seven (297) days and on Lot C, for three hundred and thirty-five (335) days.

III

That from the commencement of the operations the contractor violated the requirements of the contract specifications and violated the plan of operations which he himself had submitted, and he otherwise departed from sound methods of construction, all in wilful disregard of written and verbal warnings of the resident inspectors for the United States and of the written instructions of the contracting officer; that specifically, among the unsound practices resorted to and the contract violations committed, the contractor provided inadequate drainage; he excavated [fol. 15] and engaged in multiple handling of wet material during rains; he placed saturated material within the embankment; he placed wet material on an undrained foundation; he pocketed water between partial fills; he developed puddling by repeatedly and unnecessarily handling material prior to its placement in the levee; he caused damage to the embankment by superimposing the weight of large machines and operating them from on top of the fill; he constructed partial fills with excessively steep side slopes thereby creating planes of cleavage or separation which caused base slides; he failed to remove and destroy cleavage planes when cutting out slides and thereby caused additional slides in the refill material after cut-outs; he overdug the borrow pits; he damaged levee foundations by overdigging inspection ditches; and he failed to start the embankment out full to the slope stakes and carry it regularly up to the gross fill.

IV

That by reason of the contractor's failure to begin work only after long delays on each Lot, and because of his

violations of the contract and the specifications, and because of his failure to diligently prosecute the work and to place sufficient men and equipment thereon so as to insure its completion within the time specified, the contractor found on December 12, 1932, that approximately 91% of the contract time period had elapsed and that only approximately [fol. 16] 48% of the material was in place, with much of this material in a condition which was totally unfit and unacceptable to the United States as levee material, in that it was wet material which was sloughing or showed tendencies to slough and was full of numerous slides and planes of cleavage contrary to the requirements of the specifications. The contractor addressed the following letter to the contracting officer under date of December 12, 1932:

Careful investigations and extensive explorations of the conditions at the site have disclosed the fact that the subsurface and/or latent conditions differ materially from the conditions as represented in the plans and specifications, and you are hereby formally notified that I elect to rescind my contract with full reservations of all my rights in the premises.

However, if mutually satisfactory adjustments can be made, I am willing to proceed with the work and to that end I hold myself in readiness to discuss this matter with you at any time within the next forty-eight hours. Kindly acknowledge receipt of this letter, and oblige,

Yours very truly, Alex Ranieri.

That on December 14, 1932, the contractor received the following from the contracting officer:

I have your letter dated December 12, 1932, delivered to my office by your attorneys upon the date named, on the [fol. 17] subject of your contract for the construction of Chamberlain-Lobdell Levee, Lots A, B, C, and D, in which you state that due to subsurface and/or latent conditions discovered you have elected to rescind your contract, reserving in full all your rights under said contract. Your letter does not disclose in what manner, form, or particular, subsurface and/or latent conditions differ materially from the drawings or those shown in the specifications, without which information I am unable to take further steps as provided in the contract.

Your attention is also invited to the fact that irrevocable powers of attorney granted by you to Manning William O'Meara and the National Surety Company, each coupled with an interest in said contract, seem to preclude individual action by you in furtherance of your rights under the contract. You are, therefore, requested to furnish such information or proof as may be available to you as to what changes in subsurface and/or latent conditions now exist under the contract, and to obtain the signature of the above-named agents and attorneys in fact in support of the evidence so submitted.

In the meantime your right to rescind the contract is denied and you are expected to proceed with the work called for under the terms of the contract.

V

That on the 26th day of September 1932, the petitioner had entered into a subcontract with Manning William [fol. 18] O'Meara for the construction of that part of the new Chamberlain-Lobdell Levee Item R-831 which was embraced within stations 3378 to 3431 in Lot C, and stations 3431 to 3472 in Lot D; that this said subcontract was amended and extended by addenda thereto on November 9, 1932; that also on November 9, 1932, the petitioner executed a full and irrevocable power of attorney to the said Manning William O'Meara covering the portions of the work which had been sublet to him as set forth above; that the said power of attorney recites that the said attorney has an interest in said contract; that a copy of the power of attorney to Manning William O'Meara is attached hereto, marked "Exhibit C" and is made a part hereof.

VI

That on the 26th day of November 1932, the petitioner executed a full and irrevocable power of attorney to the National Surety Company of 115 Broadway, New York, covering all of the work of levee construction of Item R-831, Chamberlain-Lobdell Levee, Lots A, B, C, and D, with the exception of the portion of the work which had been previously sublet to Manning William O'Meara, as set forth in paragraph V above; that this said power of attorney recites that the National Surety Company, attorney in fact,

as surety on the bond of Alex Ranieri, has an interest in said contract; that a copy of this power of attorney to the [fol. 19] National Surety Company is attached hereto, marked "Exhibit D" and is made a part hereof.

VII

That subsequent to December 12th, 1932, no work of any sort was performed on any part of the project, Item R-831, either by the petitioner, or Manning William O'Meara, or the National Surety Company; that on January 3, 1933, just nineteen days prior to the expiration of the contract period of 450 days allowed for the completion of the work, and with less than forty-five per cent of the required earthwork in place, the contracting officer advised the petitioner, and Manning William O'Meara, and the National Surety Company that owing to the failure to prosecute the work with such diligence as to insure its completion within the contract period, the right to proceed with the work was thereby terminated under the provisions of Article 9 of the contract; that on the same day, January 3, 1933, the contracting officer asked the National Surety Company, as surety, to state whether or not it desired to complete the work in accordance with the terms of the contract; that the National Surety Company did not so elect and on May 19, 1933, consented to a re-advertisement of the contract by the United States without prejudice.

Defendant denies all other allegations of the petition.

[fol. 20] COUNTERCLAIM

Further answering and by way of counterclaim the defendant alleges:

I

That the United States, acting through the United States Engineer Office of the War Department in New Orleans, Louisiana, on June 6, 1933, readvertised for bids for the completion of the contract entered into on October 12, 1931, between the petitioner, Alex Ranieri, and the United States, for the construction of the Chamberlain-Lobdell Levee, Item R-831, Lots A, B, C, and D; that under the new specifications, being number 33576, a copy of which is at-

tached hereto and made a part hereof, marked "Exhibit E", no material departure was made from the original specifications; that due to the earthwork already in place, the amount estimated as being necessary to complete the levee to original grade and section was given as approximately 1,612,000 cubic yards; that the time for placing the same was set at 240 days; and necessarily, by reason of the former unsatisfactory workmanship and materials in the earthwork placed by the petitioner, Alex Ranieri, the new specifications provided for the cutting out of the existing slides for which no payment was to be made for cutting out but only for satisfactorily completed levee; that the new specifications also necessarily required the refilling of cer- [fol. 21] tain overdug pits and berms because of the prior negligent and improper work of the petitioner in overdigging the same contrary to his original contract and specifications. In all other respects the specifications remained the same.

II

That bids were opened on June 26, 1933, and the work was awarded to Walter S. Hardwick and Ferdinand M. Horton, the low bidder, and a contract was entered into by them with the United States on July 10, 1933, for the construction of the uncompleted portion of the Chamberlain-Lobdell Levee, Lots A, B, C, and D, for a consideration of 18.60 cents per cubic yard; that a copy of this contract is attached hereto marked "Exhibit F", and is made a part hereof; that the new contract is known as W-1096 eng 2871.

III

That all of the work was satisfactorily completed by Messrs. W. S. Hardwick and F. M. Horton on July 1, 1934; that the new contractor placed in the levee a total of 1,700,-650 cubic yards of earth in order to bring the completed structure to required grade and section; that the following is a table showing the computation of the excess cost to the United States brought about by the default of the peti-

[fol. 22] tioner, Alex Ranieri. and the necessity of reletting and completing the levee as originally contracted for:

Cost of placing 1,700,650 cubic yards at $.186 per cu. yd. under contract W-1096-eng-2871	$316,320.90	
Cost under contract W-1096-eng-1929 at $.124 per cu. yd.	210,880.60	
Difference		$105,440.30
Cost of readvertising and reletting work		79.27
Cost of supervision and inspection after default and prior to completion		3,444.31
District and Division overhead after default and prior to completion		31.83
Excess Cost		108,995.71
Amount due Alex Ranieri and not paid for at time of default		
Retained percentages (10%) on payments	$11,301.40	
25% retained on partial fill.....	36,723.65	
Due for 188,044 cubic yards in place at $.1240 per cubic yard, not paid for.....	23,317.46	
		$71,342.51
Balance due the United States.....		37,653.20

That by reason of the petitioner's failure or refusal to do any more work on his contract after December 12, 1932, the defendant in readvertising and reletting the levee construction necessary for the completion of the said work was required to and did pay $108,995.71 more than the work would have cost had the petitioner completed the construction of the levee as required by his contract of October 12, 1931; and that, against this sum of $108,995.71 there was, however, due and owing to Alex Ranieri from the United States under his contract, the sum of $71,342.51; that this sum is made up of three items, viz: (a) ten percent retained percentage on payments made to him, as provided for by paragraph 7 of the specifications in his contract, and which amounts to $11,301.40; (b) 25% retained by the United

[fols. 23-29] States on partial fills where the levee had not been completed to grade and section, which sum amounts to $36,723.65 and which is also provided for by paragraph 7 of the specifications in the contract; (c) the sum of $23,-317.46 which was due for 188,044 cubic yards of material in place but which was not paid for by the United States at the rate of $.1240 per cubic yard.

V

That the difference between the said excess cost figure $108,995.71 and the figure $71,342.51, which was due the petitioner is the sum of $37,653.20, and the defendant has suffered damage to this amount by reason of the acts and defaults of the petitioner, and said sum of $37,653.20 with interest thereon at the rate of 6% per annum from July 1, 1934, when final settlement was had with, and final payment was made to, Messrs. W. S. Hardwick and F. M. Horton for the completion of said work, is owing by the petitioner to and is due the defendant under Article 9 of the original contract of October 12, 1931.

Wherefore, the defendant prays that the petition filed herein be dismissed, that the petitioner take nothing, and that the defendant have judgment over and against the petitioner for the sum of $37,653.20 with interest at 6% per annum from July 1, 1934, until paid.

George C. Sweeney, Assistant Attorney General.
Edgar T. Fell, Attorney.

* * * * * * *

[fols. 30-32] EXHIBIT E TO COUNTERCLAIM

No. ..... Bidder .....

[Do not write above this line]

Standard Government Form of Invitation for Bids

(Construction Contract)

Spec. No. 33.576

* * * * * * *

[fols. 33-36] 7. *Payments.*—(*a*) *For work under straight contracts.*—Payments will be made on monthly estimates of net yardage in place; provided that only 75 per cent of the

unit price will be allowed for material in fill not completed to grade and section; and provided further that no estimate on such incomplete fill will be made on less than 20 percent of the material comprised in the specified section. This limits estimates on any section to five. A percentage of 10 percent will be reserved from each payment until the work is fully completed; except that the contracting officer, at any time after 50 percent of the work in an item shown in paragraph 39 hereof as constituting a unit of the contract has been completed, if he finds that satisfactory progress is being made, may make any of the remaining payments in full upon work under said item that has been completed to grade and section.

When all the requirements of the contract and these specifications have been fully completed to the satisfaction of the contracting officer the work will be accepted and final payment made. (See paragraph 38.) Should two or more items of work be awarded to one bidder, one contract will be entered into, but payment of the retained percentages will be made upon completion of each item of work as listed in the form of bid.

* * * * * * *

[fol. 37] 9. *Acceptance of work.*—Continuous lengths of levee of 500 linear feet or more will be accepted by the contracting officer when fully and completely finished except timber felling and the sodding or seeding. The intention of this paragraph is that in case of damage or destruction through no fault of the contractor of such lengths as have been accepted such loss falls upon the United States and not upon the contractor. Portions of levee upon which payments have been made, but which have not been accepted as herein provided shall, if damaged or destroyed, be repaired or replaced by the contractor at his own expense. Retained percentage upon accepted work will not be paid to the contractor until the satisfactory completion and final acceptance as provided in paragraph 7.

* * * * * * *

[fol. 38] 13. *Right of way and material.*—This agreement is made with the understanding that the right of way and earth for constructing the levee will be furnished without cost to the contractor, except as provided in paragraph 22 (*b*). Days upon which work is prevented by failure to pro-

vide necessary right of way will not be counted against the contractor as delay in completion of contract, nor in computing the time stipulated in paragraph 2 hereof for commencement of work; but no claim is to be made by the contractor for damage or expense occasioned by delay [fol. 39] or failure in securing right of way. In event of failure to obtain right of way for all or any portion of the line by the time construction has progressed thereto, the contracting officer shall have the right to omit work on such line or portion of the line.

* * * * * * *

[fols. 40-42] 19. *Net cross section.*—Unless otherwise specified in paragraph 39 hereof, levees shall be constructed to the following net dimensions:

(*a*) Levees below Cape Girardeau, Mo., and Thebes, Ill.

Section	Crown	Riverside slope	Landside slope to contain seepage line of—	Governing material
	Feet			
A.....	10	1 on 3	1 on 6	75% or more buckshot.
B.....	10	1 on 3½	1 on 6½	Loam.
C.....	12	1 on 5	1 on 8	75% or more of sand.

* * * * * * *

[fol. 43] 22. (*a*) *Embankment.*—Unless otherwise specifically directed by the contracting officer in writing, the embankment shall be started full out to the slope stakes and be carried regularly up to the gross fill. In the case of wagons carrying 5 cubic yards or more and drawn by not less than 10-ton tractors, the fill shall be deposited in layers not exceeding 5 feet in thickness. In the cases of lighter equipment such as scrapers or horse-drawn wagons, the fill shall be deposited in layers not exceeding 3 feet in thickness. Where the work is performed by machines, the requirement of layer construction may be omitted and the work carried continuously to gross fill. If portions of the prepared right-of-way or uncompleted levee be unduly compacted from any cause whatever, before depositing any material on such surfaces they must again be thoroughly broken up as specified in paragraph 20. [fols. 44-45] Clean earth, free from all foreign matter, shall be used in constructing the embankment. No earth which sloughs or which shows tendency to slough shall

be placed in the embankment, except when placed hydraulically under paragraph 22 (*b*).

* * * * * * *

[fol. 46] 24. *Disposition of objectionable material.*—When the borrow pits, or the ground to be occupied by the levee, contains soil which is unfit to be put into or remain under the levee, the contractor will be required to remove the same and dispose of it as directed by the contracting officer. If such material removed from the ground to be occupied by the levee or removed from the [fols. 47-53] borrow pits furnished by the United States is wasted, the contractor will be paid for it at the contract price per cubic yard.

* * * * * * *

[fol. 54] 39. Description of work.—*Drawings.*—The work shall conform to the drawings marked "L-8-2268 entitled Item R 831, Chamberlin-Lobdell Levee", which form a part of these specifications and which are filed in the U. S. Engineer Office, Second New Orleans District, Foot of Prytania Street, New Orleans, La.

[fol. 55] Atchafalaya Front Levee District

Item	Stations	Kind of work	Cubic yards	Net height, fee-
R 831-A, Chamberlain-Lobdell Levee.....	3273+04 to 3329+00	New	307,000	23-30

(*a*) *Time.*—Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 240 calendar days from date of receipt of notice to proceed.

(*b*) *Borrow pits.*—The material required for this work shall be obtained from riverside borrow pits, and from the existing controlling levee to extent indicated on drawing.

(*c*) *Cross-section.*—The soil conditions indicate that a "B" cross-section is required throughout.

(d) *Slides.*—Existing slides at the approximate locations listed below shall be cut out below the sliding surface and properly restored. The basis for payment will be at the net quantity in the restoration placed above the actual cut-out, as cross-sectioned upon completion of cut-out. No

payment will be made for cutting out but only for satisfactorily completed levee in accordance with paragraph 7 hereof.

Approximate stations	Approximate quantity to be restored, cu. yds., net
3297+75 to 3299+25	8,500
3314+50 to 3315+50	7,000
3317+25 to 3321+00	35,000

(*e*) *Special provisions.*—Construction above station 3288 shall not be undertaken until authorized in writing by the contracting officer.

[fol. 56] (*f*) *Refill of overdug pits and berm.*—Pit and berm excavated in violation of specifications by the original contractor shall be restored under this contract. Payment will be made on the basis of net quantity placed. The following table shows the locations and approximate quantities of overdug pit and berm:

Approximate stations	Where violation exists	Approximate, cu. yds., net
3290+00 to 3297+75	Berm	680
3305+00 to 3315+00	Berm	340
3322+00 to 3324+00	Berm	10
3301+25 to 3302+00	Pit	40

Item	Stations	Kind of work	Cubic yards	Net height, feet
R 831–B, Chamberlain-Lobdell Levee	3329+00 to 3378+00	New	239,000	24–30

(*a*) *Time.*—Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 240 calendar days from date of receipt of notice to proceed.

(*b*) *Borrow pits.*—The material required for this work shall be obtained from riverside borrow pits.

(*c*) *Cross section.*—The soil conditions indicate that a "B" cross section is required throughout.

(*d*) *Slides.*—Existing slides at the approximate locations listed below shall be cut out below the sliding surface and properly restored. The basis for payment will be the net quantity in the restoration placed above the actual cut-out, as cross sectioned upon completion of cut-out. No payment will be made for cutting out but only for satis-

[fol. 57] factorily completed levee in accordance with paragraph 7 hereof.

Approximate stations	Approximate quantity to be restored, cu. yds., net
3333+75 to 3335+25	8,000
3336+50 to 3337+75	6,000
3340+25 to 3341+25	7,000
3342+75 to 3345+25	19,000
3361+32 to 3362+28	8,000
3362+75 to 3364+00	14,000

(*e*) *Refill of overdug berms.*—Berm excavated in violation of specifications by the original contractor shall be restored under this contract. Payment will be made on the basis of the net quantity placed. The following table shows the locations and approximate quantities of overdug berm:

Approximate stations	Where violation exists	Approximate, cu. yds., Net
3362+00 to 3378+00	Berm	400

Item	Stations	Kind of work	Cubic yards	Net height, feet
R 831-C, Chamberlain-Lobdell Levee	3378+00 to 3431+00	New	537,000	25–29

(*a*) *Time.*—Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 240 calendar days from date of receipt of notice to proceed.

(*b*) *Borrow pits.*—The material required for this work shall be obtained from riverside borrow pits.

(*c*) *Cross-section.*—The soil conditions indicate that a "B" cross-section is required throughout.

(*d*) *Slides.*—Existing slides at the approximate locations listed below shall be cut out below the sliding surface [fol. 58] and properly restored. The basis for payment will be the net quantity in the restoration placed above the actual cut-out, as cross-sectioned upon completion of cut-out. No payment will be made for cutting out but only for satisfactorily completed levee in accordance with paragraph 7 hereof.

Approximate stations	Approximate quantity to be restored, cu. yds., net
3381+00 to 3382+00	13,000
3382+70 to 3384+25	10,000

(*e*) *Refill of overdug berm.*—Berm excavated in violation of specifications by the original contractor shall be restored under this contract. Payment will be made on the basis of the net quantity placed. The following table shows the locations and approximate quantities of overdug berm:

Approximate stations	Where violation exists	Approximate cu. yds., net
3391+00 to 3393+00	Berm	50

Item	Stations	Kind of work	Cubic yards	Net height, feet
R 831-D, Chamberlain-Lobdell Levee	3431+00 to 3493+20	New	529,000	21-26

(*a*) *Time.*—Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 240 calendar days from date of receipt of notice to proceed.

(*b*) *Borrow pits.*—The material required for this work shall be obtained from riverside borrow pits, and from [fol. 59] the existing levee to extent indicated on drawing.

(*c*) *Cross-section.*—The soil conditions indicate that a "B" cross-section is required throughout.

(*d*) *Slides.*—Existing slides at the approximate locations listed below shall be cut out below the sliding surface and properly restored. The basis for payment will be the net quantity in the restoration placed above the actual cut-out, as cross-sectioned upon completion of cut-out. No payment will be made for cutting out but only for satisfactorily completed levee in accordance with paragraph 7 hereof.

Approximate stations	Approximate quantity to be restored, cu. yds., net
3470+00 to 3472+00	13,000

(*e*) *Refill of overdug berm.*—Berm excavated in violation of specifications by the original contractor shall be restored under this contract. Payment will be made on the basis of the net quantity placed. The following table shows the locations and approximate quantities of overdug berm:

Approximate stations	Where violation exists	Approximate, cu. yds., net
3463+00 to 3476+00	Berm	310

(*f*) *Special provisions.*—Construction below station 3485+00 shall not be undertaken until authorized in writing by the contracting officer. The right is reserved to require the construction of a wing levee approximately 500 feet long, at the lower end of the work as indicated on the drawing. The estimated quantity of this wing [fol. 60] levee is approximately 35,000 cubic yards, which is not included in the total estimated quantity shown in the tabulation above. Material for this work shall be obtained from river side borrow pits and from the existing levee to extent indicated on drawings. If constructed payment for the wing levee will be made at the contract price per cubic yard.

Estimates by United States.—Bidders are advised that the United States will prepare estimates of cost of construction by the use of Government plant and hired labor on each individual item and on combinations of items as listed under "Combinations" in the bid form.

General provisions.—The following general provisions shall be applicable to all work under these specifications:

Measurements for payments.—Payment will be made on the basis of the quantities placed under these specifications within prescribed gross dimensions, less the shrinkage allowance called for by par. 27 hereof.

Yardage will be determined by place measurement.

Determination of settlement.—Claims for reimbursement for additional yardage under the provisions of first subparagraph of paragraph 28 hereof to be considered must be substantiated by measurement of the vertical displacement of the foundation made within 48 hours after completion of embankment at the site of the structure installed to measure such foundation settlement.

U. S. Engineer Office, Second New Orleans District, Foot of Prytania Street, New Orleans, La., June 6, 1933.

[fols. 61-62] EXHIBIT F TO COUNTERCLAIM

Standard Government Form of Contract

(Construction)

Contract W 1096 eng.-2781. July 10, 1933.
Department: War (Engineer Department at Large) U. S. Engineer Office, Second New Orleans District.
Contractor: W. S. Hardwick and F. M. Horton.

Contract for Chamberlaim-Lobdell Levee:	Amount
Item R 831-A	$57,102.00
Item R 831-B	44,454.00
Item R 831-C	99,882.00
Item R 831-D	98,394.00
Approximately	299,832.00

Place: Atchafalaya Front Levee District.

Contract for Construction

* * * * * * *

[fol. 63] ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed Conditions.*—Should the contractor encounter, or the Government discover, during the progress

of the work, subsurface and (or) latent conditions at the [fols. 64-65] site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

* * * * * * *

[fol. 66] ARTICLE 7.—*Materials and Workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kind for the purpose.

* * * * * * *

[fol. 67] ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the

Government as fixed, agreed, and liquidated, damages for each calendar day of delay until the work is completed or [fols. 68-69] accepted, the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unfor-seeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further,* That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

* * * * * * *

[fol. 70] ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory [fols. 71-76] work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final

completion and acceptance of all work covered by the contract: *Provided, however,* That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all the terms of the contract.

* * * * * * *

[fol. 77] IV. Replication to Answer and Counterclaim—Filed August 23, 1935

The Claimant, for answer to the counterclaim of the Defendant, hereby makes the following reply, viz.—

1.) Claimant alleges that he did not unreasonably delay in commencing the work under contract described in the petition herein, and alleges that all of the time previous to his commencing said work was necessarily and profitably employed by him in making such preparation for said work that when actual construction began it would be expedited by the time so taken in proper preparation.

2.) Claimant denies that in doing the construction work under said contract he violated either the requirements of the contract specifications or the plan of operations, or departed from sound construction methods; and claimant specifically denies that he resorted to any of what are denominated unsound practices or committed any of what [fol. 78] are called contract violations enumerated in the subdivision of Defendant's special answer and counterclaim numbered III, and alleges that he did all his work

under said contract in a proper and sound construction way.

3.) Claimant denies that by reason of his failure to begin work only after long delay and because of his violation of the contract in the specifications, and his failure to diligently prosecute the work, and to place sufficient men and equipment failed to insure its completion within the time specified, or by reason of any of such alleged happenings (all of which allegations claimant alleges to be untrue), on December 12, 1932, only 48% of the material was in place, with much of it unfit and unacceptable as levee material, because it was wet material sloughing or showed tendencies to slough, and full of slides and planes of cleavage, contrary to the specification requirements; and, on the contrary, claimant alleges that the fact that but 48% of the material was in place at said date was due wholly to the fact that the material to be excavated and placed was not loam, as represented in the specifications, but an admixture of clay, organic matter, sand and silt, all heavily impregnated with water, and with the stumps of cypress swamp scattered throughout the area thickly enough to seriously interfere with the work, and interspersed with underground water, seeping through it at frequent intervals, and the site of a crevass- as more particularly described in the petition, which, while differing as stated from what it was represented in the specifications to be, made it far more difficult to excavate and place, and the circumstance that the United States officials in charge required the work to be done as if the material had been loam instead of the kind de-
[fol. 79] scribed, which was unsuited to and improper for the kind of material actually found, which two circumstances together rendered it impossible to complete the construction within the time specified in the contract, or to do more than was done at the date mentioned.

This claimant denies that much, or any, except a neglible amount, of the material which had been placed was unfit, and alleges that it was proper material and in proper condition, and should have been acceptable to and accepted by the United States.

4.) Claimant admits that he sent, December 12, 1932, the notice (denominated a letter in the answer and counterclaim), set out under No. IV of said answer and counterclaim, and that he received, December 14, 1932, the com-

munication set out in subdivision IV from the contracting officer.

Claimant further alleges that it was unnecessary to disclose in his said notice in what manner, form, or particular, subsurface and/or latent conditions differ materially from the drawings or those shown in the specifications, as it was wholly known to the contracting officer and to the United States previous to the letting of the contract herein that the material to be excavated and placed was not loam, as stated and shown in the specifications, but was of the character and kind hereinabove, and in the petition particularly described; and the nature of said material was disclosed from day to day as the work proceeded, from the time that claimant undertook the same, when the contracting officer by frequent if not daily inspection had become, and was thoroughly familiar with the differences in the material between [fol. 80] the description in the specifications and the material actually being excavated and placed.

6.) Claimant further alleges that the powers of attorney described in the answer and counterclaim to Manning William O'Meara and the National Surety Company did not give or purport to give said attorneys in fact or either of them the exclusive right to act for claimant in respect to the construction contract, or deprive, or attempt or purport to deprive claimant of the right to act with respect thereto in all matters, and, particularly, in matters between this claimant and defendant, and claimant, therefore, alleges that it was not necessary to have either of said attorneys in fact join in claimant's notice that he rescinded the construction contract.

7.) Claimant further alleges that defendant never gave him notice of its readvertising for bids for the completion of the construction work described in said contract, and that claimant is not, and did not become bound by said readvertising for bids, or by the attempted reletting of the contract, or the result or any of them of the work done thereunder.

And claimant alleges that by such failure to notify claimant of such readvertising for bids, defendant recognized claimant's notice of rescision, and his rescision thereby was made valid and said failure validated the same.

8.) Claimant further alleges that by virtue of the defendant having misrepresented the nature of the soil to

be excavated and placed as loam when it was not of that kind, but was of the nature and kind hereinabove and in the petition particularly described, and was, therefore, far more difficult and far more expensive to handle, and consumed a much longer time both to excavate and place, and [fol. 81] through defendant's insisting and requiring that said excavating and placing and the construction work should be done in a manner suited to loam, and unsuitable and extremely difficult with the soil that was in fact found, claimant had the right to rescind said contract and became entitled to payment for the damages which he suffered through such misrepresentation, and said requirement to do said work in the manner above described, and for the work which he did in accordance with the contract and as specified in the petition herein, and that he is not liable for the increased cost of any part thereof paid by defendant in completing said construction work; and claimant alleges that said attempted reletting was made at a time when the prices of such construction work were much lower than when the contract described in the petition was made, and that, taking this into consideration, the fair value of the construction work at the time the contract was let, and the prices which would have been bid had the real nature and kind of the material to be excavated and placed been made known, instead of being misrepresented as loam, would have been more than the $.186 paid to the new contractor, instead of $.124, the price at which claimant was induced to bid through said misrepresentation as to the nature of the soil to be excavated and placed.

That claimant was obliged to and did do all of the preliminary work necessary to the beginning construction, which included many details and took a very considerable time, all of which was done at large cost. That the new bidder had none of this preliminary work to do, but had solely the cost of excavating and placing the remaining [fol. 82] cubic yards to complete construction, without any of this preliminary expense or delay. That taking into account the time claimant was obliged to give to preliminary work (aside from claimant's being required by the contracting officer to do the work in a manner unsuitable to the material encountered, and, therefore, unnecessarily difficult and expensive, and taking much longer), claimant did not take as much time per cubic yard in excavating and placing the material as was taken by the new bidder.

Wherefore, claimant prays judgment, in accordance with the part of the petition, for $258,880.49, together with interest from December 14, 1932, the date when the contract described in the petition was rescinded, and for such other, further, or different judgment or relief as may be just and equitable in the premises, and for the dismissal of said counterclaim.

Dated this 13th day of August, 1935.

S. Wallace Dempsey, Attorney for Claimant, 721-723 Investment Building, Washington, D. C.

[fols. 83-84] *Duly sworn to by Alex Ranieri. Jurat omitted in printing.*

V. Argument and Submission of Case

On October 8, 1941, the case was argued and submitted on merits by Mr. S. Wallace Dempsey for plaintiff, and by Mr. W. A. Stern, II, for defendant.

[fol. 85] VI. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Jones, J.**— Filed February 2, 1942

Mr. S. Wallace Dempsey for the plaintiff. Mr. Bruce Fuller was on the briefs.

Mr. W. A. Stern, II, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

This case having been heard by the Court of Claims, the court, upon the report of a commissioner and the evidence, makes the following

Special Findings of Fact

1. Plaintiff and defendant entered into a contract October 12, 1931, numbered W 1096 eng. 1929, whereby, for a consideration of 12.40 cents per cubic yard, place measurement, the plaintiff agreed to "furnish all labor and materials, and perform all work required for the construction of Item R 831, Chamberlain-Lobdell Levee, Lots A, B, C, & D, containing approximately two million nine hundred fifty thousand (2,950,000) yards, situated in the Atchafalaya Front Levee District," in accordance with specifications, schedules, and drawings, all made a part of the contract and designated "Engineer Department, U. S.

Army, Standard Specifications for Levee Work, No. 32.38, dated August 25, 1931, and drawing entitled Item R 831, Chamberlain-Lobdell Levee, File No. L-8-2268."

Under the contract the work on each of the four lots was to commence within 20 calendar days after the respective dates of receipt of notice to proceed thereon and be completed within 450 calendar days from the date of receipt of such notice.

[fol. 86] About 2,000 linear feet out of 20,000 feet of an old levee were made available by the contract for the new levee construction and the remainder of the material was to be obtained from riverside borrow pits.

The specifications stated that the soil conditions indicated a B Section was required throughout.

Paragraph 19 of the specifications described a B Section as having a crown of 10 feet, a riverside slope of 1 on 3½, the landside slope as containing a seepage line of 1 on 6½, and the governing material as loam.

Copy of the contract, the specifications and drawing is in evidence and made part hereof by reference.

The plaintiff had had no experience in building levees.

Prior to bidding, representatives of the plaintiff visited and inspected the site of the proposed levee.

2. The levee to be constructed extended from station 3273+04 to station 3493+20, a distance of about 22,000 feet. Borings had been taken over the site of the proposed levee at intervals of 1,000 feet, each to a depth of about 25 feet, and a chart of these borings appeared on the contract map. Plaintiff had been furnished the contract map and specifications before submitting his bid. This chart classified the earth disclosed by the borings as sandy loam, sandy clay, sand and loam, clay, loam, sand and silt, clay and silt, brown clay, soft brown clay and sand, soft blue clay, hard blue clay, and lastly soft brown clay, and indicated the several depths and locations at which these various classes had been found in the hole bored.

The average depth of loam or sandy loam disclosed by these borings was about 6 feet, the maximum depth was 16 feet and the minimum depth 1 foot, a mean depth of 8½ feet.

There was sufficient satisfactory material in the borrow pits and in the available sections of the old levee from which to construct a B Section, and the new levee was

eventually successfully constructed from such sources with a B Section.

There is no evidence that the borings were inaccurately charted.

3. On October 30, 1931, the plaintiff received notice to proceed with the work. This fixed the date for completion [fol. 87] as on or before January 22, 1933. He commenced in contract time with preparatory work such as clearing, grubbing, and plowing, which required about one week's time.

Plaintiff began the placing of material in the levee on Lot A February 10, 1932; on Lot B June 14, 1932; on Lot D August 23, 1932; and on Lot C September 30, 1932, 103, 228, 298, and 366 days, respectively, after receipt of notice to proceed.

4. Plaintiff sublet a part of the work as of September 19, 1932, to Robinson & Young, a co-partnership, being certain work on Lots C and D, and as of September 26, 1932, to M. W. O'Meara, being certain other work on Lots C and D.

5. In the course of the work the Government inspectors on the job served current notices upon the plaintiff warning him of departures he was making from contract requirements. The instances of such violations, as communicated to plaintiff from time to time, were as follows:

	Number of instances
Borrow pits:	
Overdug (Par. 25)	23
Embankment:	
Not started full out to slope stakes (Par. 22-a)	16
Water impounded between partial fills (Par. 33)	24
Wet material (Par. 22-a)	40
Material showing tendency to slough (Par. 22-a)	67
Grade deficient (Construction notes)	3
Surface of incomplete levee not thoroughly broken and turned to depth of 6 inches (Par. 22-a)	2
Foundation:	
Not properly prepared (Par. 20)	6
Wet base (Par. 33)	41
Water on berm (Par. 33)	4
Inspection ditch excessive in width and depth (Par. 20)	5
Total	231

Of the total instances as to which warnings were issued 102 related to Lot A, 46 to Lot B, 32 to Lot C, and 51 to Lot D.

Included in these notices was one dated March 1, 1932, warning that material placed in the embankment showed a tendency to slough. The plaintiff took exception to this criticism March 7, 1932, in the following letter to the contracting officer:

As you know we are having our first experience on building levees. We proposed when we came into this business [fol. 88] to do our work just as well as possible and live up to all reasonable requirements of the inspector and engineer in charge.

On the morning of March 1, the inspector Mr. Laforber gave us a ticket for placing wet dirt in the levee. We wish to say that the dirt placed in the levee was not wet. This dirt had been dug several weeks ago and drainage had been maintained ever since. In fact the dirt was so dry that one could walk on it without soiling anything but the soles of his shoes.

We would like to call your attention to the fact that we are dropping from ten to twelve yards at a time and this may cause a slight settlement of the dirt already dry upon which it falls. But that does not justify any reasonable man of intimating or writing something which is false.

There is no proof that the plaintiff at any time otherwise contested the inaccuracy of these notices.

During the progress of the work the contracting officer, finding that the plaintiff was violating various provisions of the specifications in the construction of the levee, or engaging in harmful practices, communicated such findings to the plaintiff, directed him to correct the conditions complained of, and warned him that he would be held responsible for resulting damage to the levee. The subject matter of the contracting officer's notifications and their dates are as follows:

Feb. 16, 1932: Water on berm.
Mar. 2, 1932: Water impounded between partial fills.
Apr. 15, 1932: Enbankment not started full out to slope stakes.
June 18, 1932: Excessive gross grade.
June 20, 1932: Embankment not started full out to slope stakes.

July 20, 1932: Machine working on incomplete embankment.
Oct. 8, 1932: Slide due to wet material.
Oct. 18, 1932: Slide due to wet material.
Oct. 28, 1932: Overdug borrow pits.
Nov. 26, 1932: Slide due to sloughing material.
Nov. 29, 1932: Slide due to wet material and method of construction.
Dec. 12, 1932: (1) Slide due to wet material and method of construction.
Dec. 12, 1932: (2) Slide due to wet material and method of construction.
Dec. 14, 1932: Placing material with tendency to slough.

On September 15, 1932, the contracting officer notified the plaintiff in writing that the progress of the work was unsatisfactory and demanded the use of additional equip-
[fol. 89] ment, and again communicated with plaintiff October 14, 1932, by letter as follows:

A review of the progress of construction on Chamberlain-Lobdell Levee discloses that none of the embankment in Lots A and B has been completed to the grade and section required under the contract. All of the equipment on Lot A between the dates of August 10, 1932, and October 1, 1932, has been engaged in cutting out the numerous slides which occurred in the partially completed embankment. During the thirty-day period prior to August 10, 1932, there was placed, in the embankment comprising Lot "A", slightly less than 9,500 cubic yards of material.

Work on Lot "B" began about April 25, 1932. Numerous difficulties with your equipment due to breakdowns, and many days of delay due to lack of proper drainage, arose during the course of construction, and slides, dues to your faulty methods of construction, have developed which further delay completion. Up to October 1, 1932, none of the embankment was completed to the grade and section required under the contract. The lot is only 50% completed and 75% of the time allowed for its completion has already elapsed.

Due to unsound construction methods adopted by yourselves, the embankment as presently installed in Lots "A" and "B" is not considered entirely satisfactory for completion. The unsound construction methods referred to included operations which provided for handling and re-

handling of material several times before its final placement; construction of partial fills on slopes steeper than provided for in the contract specifications: introduction of pockets and valleys into the work between partial fills, which provided excellent basins for collecting and impounding rainfall and moisture seepage from the fills; construction of embankment to heights in excess of gross grade thereby providing conditions conducive to (1) slides, because slopes are necessarily steeper than provided for in the contract specifications, and (2) foundation failures due to the excess weight imposed by the added load; installation of a dragline machine atop partially completed embankment, producing excessive vibration and also adding excess weight to be borne by the foundation area; lack of proper drainage for the successful execution of the work; overdigging of borrow pits and excavation of inspection ditch to dimen-[fol. 90] sions greater than specified, all of which are in the nature of violations of contract specifications or contrary to sound construction practice.

It is the opinion of this office that additional difficulties will probably ensue when completion of the presently installed partial fill is attempted. The doubtful nature of the work already done by you prohibits additional partial payments on work to be done on Lots "A" and "B". You are therefore advised that no further partial payments will be made for incompleted embankment in these two items. Payment for completed embankment will be made as provided for in paragraph 9 of the contract specifications.

I am in receipt of your letter dated September 24, 1932, in which you list certain equipment which was proposed to be placed in operation on your work at once. This list included one Monighan 6 W Dragline, and three small draglines to be used in conjunction with tractor and wagon hauling units. It is noted that the small draglines and the tractor and wagon units were placed in operation on Lot "C" between the dates September 26 and September 29, 1932. However, the Monighan 6 W dragline has not yet been placed in operation.

Again, on October 2, 1932, you wrote to this office, through Mr. Edgar S. Maupin, Area Engineer, stating that a Monighan 6 W dragline machine would be on the site of the work immediately. This machine has not yet been placed in operation, nor is it yet on the site of the work.

It is desired to inform you that in order to complete Lot "A" within the time fixed for completion, it will be necessary to install additional equipment capable of handling at least 2,000 cubic yards per day. The equipment presently engaged on this lot is estimated to have a capacity of approximately 3,000 cubic yards per day. As there remains only about 70 effective working days of the 100 remaining calendar days in which to place the remaining 315,000 cubic yards in this lot, the necessity for requiring additional plant is apparent. It is desired to have this additional plant on the site of operation and in working condition without undue loss of time. You are requested to inform me concerning plans for installation of this additional equipment as soon as practicable after receipt of this letter.

At no time did the plaintiff appeal to the Secretary of War from any decision of the contracting officer.

[fol. 91] 6. The plaintiff, on or about December 12, 1932, ceased work on the project, and on that date sent the following communication to the contracting officer:

Careful investigations and extensive explorations of the conditions at the site have disclosed the fact that the subsurface and/or latent conditions differ materially from the conditions as represented in the plans and specifications, and you are hereby formally notified that I elect to rescind my contract with full reservations of all my rights in the premises.

However, if mutually satisfactory adjustments can be made, I am willing to proceed with the work and to that end I hold myself in readiness to discuss this matter with you at any time within the next forty-eight hours.

Kindly acknowledge receipt of this letter, and oblige,

The contracting officer replied December 14, 1932, denying the right of plaintiff to rescind the contract, and demanding resumption of operations. Operations were not resumed. The contracting officer on January 3, 1933, transmitted the following letter to the plaintiff:

Reference is made to Contract W1096eng-1929, entered into by you on October 12, 1931, for furnishing all labor and materials and performing all work required for the construction of Item R 831, Chamberlain-Lobdell Levee,

Lots A, B, C, and D in the Atchafalaya Front Levee District, containing approximately two million nine hundred fifty thousand (2,950,000) cubic yards.

Article 1 of said contract provides that the work shall be completed within the time fixed for completion in paragraph 39 of the specifications made a part of the contract. Paragraph 39 of the specifications provides as follows:

"*Time:* Work shall be commenced in accordance with paragraph 2 of these specifications and shall be completed within 450 calendar days from date of receipt of notice to proceed."

Notice to proceed under the contract was received by you on October 30, 1931, thus fixing the date for completion as January 22, 1933. To present date 430 calendar days have elapsed since the beginning of the contract period and less than forty-five percent of the required earthwork has been constructed. Due to your failure to prosecute the work with such diligence as to insure its completion within the con- [fol. 92] tract period, your right to proceed with the work is hereby terminated under the provisions of Article 9 of the contract.

On December 12, 1932, the plaintiff had done about 45 percent of the required work, and had exhausted about 91 percent of the contract time.

7. There is an absence of proof that defendant's officers at any time misrepresented conditions to the plaintiff, either orally or in writing, or in particular through the plans or specifications.

Plaintiff could have satisfactorily completed the work with the material available and in the agreed time. His failure to do so was due to his own fault and negligence, to delay on his part in getting started in the actual handling of levee material, to his violation of the terms of the contract, and unsound practices in the handling of material. These unsound practices and contract violations related mainly to the handling and disposition of material when wet and tending to slough or slide, and the impounding of water in partial fills.

8. The work remaining to be done was relet by due advertisement and bid to other contractors, who successfully completed plaintiff's work. The actual cost to the defendant of the work remaining to be done, including administra-

tive costs and correction of plaintiff's work, such as cutting out and replacing slides, was $319,876.31, which was a fair and reasonable amount.

Had the plaintiff completed the work remaining to be done, the cost thereof to the defendant would have been $210,880.60.

The excess in cost is $108,995.71. At the time of plaintiff's default he had earned, in addition to moneys already paid him, $71,342.51, which he has never received.

The net excess cost to the United States of completing plaintiff's contract, on account of his failure to complete the contract, is $37,653.20.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is not entitled to recover, [fol. 93] and the petition is therefore dismissed. The court further concludes that defendant is entitled to recover on its counterclaim $37,653.20.

It is therefore adjudged and ordered that the defendant recover of and from the plaintiff the sum of thirty-seven thousand six hundred fifty-three dollars and twenty cents ($37,653.20). Judgment is also rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Jones, *Judge*, delivered the opinion of the court:

On October 12, 1931, plaintiff contracted with the defendant to construct certain levees on the lower Mississippi River containing approximately 2,950,000 cubic yards of earth. The particular project was known as Item R 831, Chamberlain-Lobdell Levee, Lots A, B, C, and D. The consideration was to be 12.40 cents per cubic yard. The work was to begin on each of the four lots within 20 calendar days after receipt of notice to proceed. Completion was to be within 450 calendar days from the date of such notice.

According to the contract and specifications the material for building such levees was to be obtained from an old levee and borrow pits located on the right-of-way. The type of material to be selected from these sources was set out in the specifications.

On October 30, 1931, plaintiff received notice to proceed, and the date for completion was therefore fixed as not later than January 22, 1933.

Plaintiff was hopelessly inexperienced in the building of levees. Most of his construction experience had been in the city of Chicago and he had never done any levee construction work.

A machinery salesman by the name of Maxson talked with Mr. Ranieri and went down to visit the area where the levee was to be constructed. He was accompanied by a Mr. Dee, who was a representative of the plaintiff, and also by a Mr. Derock. Maxson made some estimates and plans of operation, and together with Derock furnished Dee some [fol. 94] figures. Upon these figures Dee made some calculations. All three looked over the site. The plaintiff used this information, plan of operations, and the calculations in making his bid. Maxson then sold him such new and second-hand machinery as was thought to be necessary in order for plaintiff to do the essential construction work.

Plaintiff's unfamiliarity with both this section of the country and the character of work he had contracted to do soon became evident. While he commenced within a week with some preparatory work such as clearing, grubbing, and plowing which required about two weeks' time, he did not begin placing the material in the levee on Lot A until about 103 days after receipt of notice to proceed; on Lot B, 228 days after such receipt; on Lot D, 298 days after receipt of notice, and on Lot C, 336 days after such receipt.

Plaintiff ran into many difficulties in handling the soil from the borrow pits, encountering cypress stumps and other organic matter, which caused damage to his machinery. He also had difficulty with sloughs and slides. There was also much rainfall. These conditions, however, were not shown to be unusual in that section.

Many times during the course of the work the Government inspectors served notices upon plaintiff warning him of departures he was making from contract requirements. Such notices were given in 231 instances, as set out in Finding 5.

On December 12, 1932, plaintiff ceased work on the project, complaining that subsurface and latent conditions differed materially from the conditions as represented in the plans and specifications, and gave formal notice that he elected to rescind the contract, indicating, however, that if

adjustments could be made he would be willing to proceed. The contracting officer replied on December 14, 1932, denying the right of the plaintiff to rescind the contract and demanding the resumption of operations. Operations, however, were not resumed, and on January 3, 1933, the contracting officer sent plaintiff a letter stating that 430 of the 450 calendar days allowed for the completion of the contract had elapsed, and that less than 45% of the required earthwork had been constructed, and notifying him that his right to proceed with the work had been terminated. The defend- [fol. 55] ant chose to relet the work to be done and it was let to other contractors who completed the construction of the levee.

The excess cost of completing the work over the amount specified in the original contract, after allowing credit for sums which plaintiff had earned in addition to the money which had been paid him prior to default was $37,653.20.

Plaintiff sues for various items set out in his petition aggregating a total of $258,880.49, which he asserts he is entitled to recover.

Defendant pleads that plaintiff is not entitled to recover any sum, and that defendant is entitled to judgment on its counterclaim in the sum of $37,653.20.

Plaintiff bases his claim in the main on the alleged failure of the defendant to furnish the plaintiff the type of soil in the borrow pits which was suitable for the building of such a levee, and upon its failure to disclose to him the nature of the soil, the type of outside material, including cypress stumps, found in some of the borrow pits, as well as the excess moisture found in the soil.

Plaintiff's first point is that defendant agreed to furnish plaintiff, without cost, clean earth, free from foreign material, which would not slough or show a tendency to slough. He cites Sections 13 and 22 (a) of the specifications. His reliance on these two provisions discloses that plaintiff wholly misinterpreted their meaning. Section 13 does provide that the defendant will furnish the right-of-way and earth for constructing the levee, but 22 (a) clearly places the obligation upon the contractor to select from the borrow pits the type of earth suited for the levees and as called for in the specifications. The plaintiff makes the same character of mistake in interpreting Section 19 of the specifications. He construes this section as a warranty on the part of the defendant that the material contained in the borrow

pits was loam, whereas the specifications merely require that a B Section be constructed of loam, which of course was to be selected by the plaintiff from the material in the borrow pits.

The evidence shows that there was sufficient material for this purpose, which conclusion is further strengthened by the fact that the later contractor completed the work in a satisfactory manner with materials drawn from these same borrow pits.

[fol. 96] Plaintiff's second point that none of the material in the borrow pits was suited to the construction of a B Section levee is not borne out by the facts as disclosed by the evidence. Plaintiff actually built some of the embankment not only to the prescribed grade but higher than the grade specified.

Plaintiff also emphasizes the fact that insufficient borings were taken and that these do not properly disclose the character of the soil which was actually found when the work began. Nowhere, however, does plaintiff contend that the charts of the borings show anything different from the true facts as disclosed by such borings. Only one boring was made for each thousand feet. There was no obligation on the part of the defendant to make any borings. However, there was an obligation on its part, if it did make borings, to fully disclose such facts as were found. This it did.

The chart classified the earth as disclosed by the borings as sandy loam, sandy clay, sand and loam, clay, loam, sand and silt, clay and silt, brown clay, soft brown clay and sand, soft blue clay, hard blue clay, and soft brown clay. The borrow pits contained sufficient of the type of material called for in the specifications for plaintiff to have constructed the levee in accordance with the contract.

The evidence rather clearly shows that the conditions found could not be called unusual. Any sort of investigation by the plaintiff, as disclosed by the various witnesses who testified, would have shown him that he would probably encounter wet soil; that it is not unusual to encounter cypress stumps; that water and such stumps are frequently found in that section, especially where there is an extra heavy growth of sugar cane, as in the instant case. The evidence further shows that defendant made no misrepresentation; that it withheld no information; that it accurately reported the borings, and that therefore the plaintiff

was not misled in any way by representations of the Government.[1]

Looking over the entire record it appears to be a clear case of a man's undertaking a large and responsible contract for a type of construction for which he was not equipped either by training or experience, in a section of [fols. 97-98] the country where soil and water conditions were entirely different from those to which he had been accustomed, and where the methods of work required and conditions likely to be encountered were wholly unfamiliar to him.

It is unfortunate, but the plaintiff duly signed the contract, which was awarded on his own bid, and voluntarily undertook its obligations. In view of the facts and circumstances as disclosed by the record we know of no way that he may avoid the legal consequences of his act.

Plaintiff is not entitled to recover against the defendant, and defendant is entitled to recover a judgment against the plaintiff on its counterclaim in the sum of $37,653.20.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

[fols. 99-100] VII. JUDGMENT OF THE COURT—February 2, 1942

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is not entitled to recover, and the court further concludes that the defendant is entitled to recover on its counterclaim.

It is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed, and that the defendant recover of and from the plaintiff the sum of thirty-seven thousand six hundred fifty-three dollars and twenty cents, ($37,653.20).

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[1] *Trimount Dredging Co.* v. *United States,* 80 C. Cls. 559; *James Stewart & Co., Inc.,* v. *United States,* 94 C. Cls. 95.

[fol. 101] VIII. Proceedings After Judgment

On April 2, 1942, the plaintiff filed a motion for a new trial.

On June 1, 1942, the court entered the following order on said motion:

Order

It is Ordered this 1st day of June, 1942, that the plaintiff's motion for a new trial be and the same is hereby overruled.

On July 8, 1942, the plaintiff filed a motion for an extension of time to September 15, 1942, within which to file a request for other parts of the record under Rule 99 (b), and said motion was allowed by the court on July 13, 1942.

[fol. 102] Plaintiff's Application for Record—Filed September 15, 1942

On September 15, 1942, plaintiff filed a request for record in re certiorari under rule 99 (b), together with other parts of the evidence agreed to by parties as material to errors assigned and petition for writ of certiorari.

[fol. 103] **IX. Parts of Evidence Agreed to by Parties on Petition for Certiorari**

Parts of the evidence agreed to by the parties as material to the errors assigned are as follows:

[fol. 104] M. W. O'Mera, (Plaintiff's Witness; Tr. 1):

I have been engaged in drainage irrigation and levee construction, investigating different types of soil and handling it, for 29 years (Tr. 2, qq. 1; 4, 7, 8; Tr. 3, q. 16; Tr. 4, qq. 18, 19, 20-23). I was on the job as a subcontractor during September, October and November 1932 (Tr. 7).

I found a little bit of loam on the top. I found clay slough, washing material, places where you found rotten debris probably in there for centuries, a mixture of everything. This soil was very, very wet. You could see the

seepage. The soil had a tendency to retain water, except when you got it under pressure (Tr. 10, 11).

It was the first time in my life I ever encountered soil like it. A levee can be built with that soil, but it takes a long time (Tr. 12).

The slope was B-section, six and a half to one, the river side was three and a half. The levee could not be built up to grade on that slope (Tr. 13).

I encountered foreign matter in the borrow pits, a great many cypress stumps (Tr. 14). It was impossible to remove them. You had to dig around blindly and break your equipment. We broke two-inch cables (Tr. 15, 16). Those cypress stumps interfered with the quantity of dirt we were to remove from the borrow pit, resulting in leaving 10% of the borrow pit area, and caused me to go out farther. It meant rehandling dirt (Tr. 15, 16). I went out 70 feet farther when I encountered those stumps than provided originally in our plans (Tr. 17).

We were delayed because of cypress stumps 30 to 40%. The soil in the borrow pits was charged with water, interfering with my work. The water would run out of the soil I took from the borrow pits when it was placed into the levee (Tr. 20, 21). The loss from water in the buckets was ten to 15%.

The Government objected to my placing sloughing material in the embankment. There was no other material to [fol. 105] be had. I said "if this material is slough I can't put it in here". He said go ahead, but don't shut down (Tr. 24).

In order to get the moisture out of the soil, we threw it up in piles, and let it set a week or ten days. Then we would go back and throw it over (Tr. 27). I did not operate and place soil on the levee at any time during rains. The inspector shuts you down immediately (Tr. 29).

In all my experience I never encountered any soil as bad as this (Tr. 30, 31).

I did not pocket water between partial fills, only for such time as was required to get it out. The water was taken off (Tr. 32).

A fair and reasonable charge for building this levee was 18 to 20 cents per cubic yard (Tr. 34).

Before I made my bid to Ranieri, I examined the site, plans and borings, which on the face of it looked like a mighty good job (Tr. 54).

No one realized that there were hidden cypress there because the soil did not show it (Tr. 56).

When I dug my inspection ditch, it would fill full of water if you did not keep it pumped. I made protest verbally to this engineer in charge, Mr. Thompson (Tr. 79). I told him that the material was so wet it would not go to grade (Tr. 80).

From the specifications a B-section is supposed to be loam, a high class material (Tr. 96).

[fol. 106] Mervin Armstrong, (Plaintiff's Witness, Tr. 342).

I am an engineer. I am employed by the Page Engineering Co. which sold equipment to Ranieri. I was employed with excavating contractors for nearly 25 years (Tr. 343.) I have been on more than 200 levee jobs, and constructed them. (Tr. 363.) It was in connection with the Page Engineering Co. that I had occasion to inspect the cite of Ranieri's work. I went to the job January 19, 1932, (Tr. 344), and the second time in July 1932, (Tr. 347). I was there from January 19th to February 4, 1932; the next trip was July 9th, and I was there intermittently until the 25th. I was back there on August 3rd. (Tr. 397.)

I examined samples of the soil taken from one place for the water content. The moisture content of the hard blue clay was 37 and ½ per cent., another test showed 31 per cent, and the sandy top soil was 28 per cent. (Tr. 349-352.) I got samples of the materials, weighed them, put them in the oven, a small stove, where they prepared their meals, slowly let it dry and weighed it again.

The water was not permitted to remain in any place for a long period of time, that was the reason adequate provision was made for drainage, to get it away. (Tr. 352.)

There were cypress stumps in the borrow pits. (Tr. 353.) Sometimes they were too thick for a bucket to pull between them. They interfered with the efficiency of the dragline equipment, and retarded the progress. It was necessary to go farther out for material. (Tr. 354.)

I would roughly estimate that eighty per cent of the material was composed of sedimentary material, silty

clays and silty sands. Such material as that could not be built in the time allowed, 450 days. (Tr. 367.)

The inspection ditches were always being pumped out. They were wet as "the devil", and full of water. (Tr. 368.)

Ranieri pumped out the pocket water between the fills. I did not observe any pocket water on the levee for any [fol. 107] period of time. (Tr. 368, 369.)

I saw the sheet of borings. Hard blue clay as I understand it didn't exist. (Tr. 374.) This clay on this job was full of vegetable matter, had a stink to it. (Tr. 375.)

In my opinion, it was impossible to get the water out of the ground to reduce the water content so he could work and stand on it. (Tr. 380.)

If Ranieri had been ready to proceed at once and if working conditions had been good, the levee construction could have been completed within 450 days. Under the conditions as existed, it was not possible to complete that levee in four hundred and fifty days. (Tr. 405, 406.)

The Government placed back limits on the pits in some places due to the fact that the rule was we could not approach the old controlling levee within a certain limit. (Tr. 393.)

[fol. 108] Glenway Maxon, Jr. (Plaintiff's Witness, Tr. 100).

I am a mechanical engineer, graduate of the University of Wisconsin, and not a construction engineer. I designed contractor's equipment for ten years. From my association with excavating contractors and from my experience in appearing on jobs since 1926, I am able to judge the various types of earth excavated by contractors. (Tr. 100, 101). Ranieri had never done any levee construction work on the Mississippi River, nor had I. I do not know who in his organization had had such experience. I was at the site a good part of the time from the last of November 1931 to June 15, 1932, and occasionally for another few months. (Tr. 143).

Before work was started, I prepared and submitted plaintiff's plan of operation, and the machinery to be used, which the Government accepted. (Tr. 117, q. 27; Tr. 120). The machinery to be used was one Page Class 222 with a 90 foot boom and 4 yard bucket; a 430 Page with a 70 foot boom and 8 yard bucket; (Tr. 102, 103); and a P. & H. machine.

(Tr. 104). With this equipment Ranieri could have started at one end and come through to the other end of all four items, and completed the whole of it within 450 days, if the soil had been as we expected. (Tr. 187, q. 66).

The cypress stumps in the borrow pits interfered with the amount of dirt that could be had from those borrow pits, making it necessary to go further out to get material. It meant practically an entire different plan had to be used, by hauling part of it and rehandling the dirt twice with the big machines. I would say it would double the cost. It definitely impeded the progress of the work. I did not contemplate any of those conditions at the time I submitted the plan to the Government (Tr. 140, qq. 195-200; Tr. 143-145, qq. 210-214).

From my experience with these levees, it would not be possible to complete a levee of the size undertaken by Ranieri with that type of material, and bring it up to grade in a period of 450 days. (q. 175). This is an opinion [fol. 109] based on observation, as I had never done any levee construction work. (Tr. 212-213).

Just as soon as the borrow pits were opened up, they brought forth a terrible stench. (Tr. 136, 137). In some places the water practically cascaded underneath the loam which was 3 or 4 feet thick in places. (Tr. 134, q. 170).

This soil was not the type of soil that should have gone into the levee. There was no material close to hand other than the material provided for in the borrow pits with which to build the levee. (Tr. 169, qq. 302, 303).

By the method used, they insisted upon bringing the dirt all the way back. (Tr. 143). Ranieri attempted to fulfill a requirement which was very difficult to understand. He first placed the material which they rehandled into the landside toe and dressed it completely. Then he came with the big machines and placed the riverside toe, and then had to level that all off. In other words, he could not put a pile here, and a pile there to make drainage for the water. They required him to level that right straight off on top. (Tr. 145).

As to pocket water, I saw one or two little ponds which he got them right out, they were not permitted to remain for any length of time. (Tr. 145). Ranieri provided adequate drainage. When you drop a bucket the dirt stands 8 to 10 feet high. (Tr. 197). At all times there were pumps.

(Tr. 141, 142, qq. 202, 206). Everything possible was done to drain the site. (Id.; Tr. 196, 197).

About a week or ten days before rescission, financial aid was badly needed as we had a payroll of seven or eight thousand dollars staring us in the face, and it would be only folly to continue on not knowing where we were going to get money to pay any more expenses that might be incurred. (Tr. 331).

[fol. 110] Victor Fabris, (Plaintiff's Witness; Tr. 218).

I have been a sewer foreman for 18 years. I have handled various types of earth, many kinds. I am able to distinguish between them, to tell the difference. I was foreman of a shift on this job, from November 14, 1931. (Tr. 218, 219). The Superintendents were Derock, Ed. White and Joe White, and after that Mr. McWilliams. (Tr. 243).

There were cypress stumps in the borrow pits. They were close together, and we could not get the buckets in between them. (Tr. 224). They slowed the machines down 25 to 30%. We ran short of dirt due to the cypress stumps, and had to go out further to get some more dirt. (Tr. 225). In going out further for dirt, in the borrow pit, it was necessary to handle the dirt in wagons sometimes 3 times. (Tr. 229).

The minute it quit raining, we would pump it out and drain. We did not leave the water on the levee for any length of time. (Tr. 230). The minute we knew that the borrow pit was dug too deep, we refilled it the same day. (Tr. 235).

[fol. 111] William M. Dee, (Plaintiff's Witness; Tr. 253).

I kept the books and records for Ranieri. A fair price for the work under the conditions would be 21 cents per cubic yard. (Tr. 287). We hired McWilliams as superintendent for the job, (Tr. 267), on July 15, 1932. (Tr. 303). I went to the site previous to the bids and looked over the land with Derock and Maxon, (Tr. 266), and was there from July 9, 1932, (Tr. 267), during which time I was on the job every day for half a day. (Tr. 294).

I made complaints to Colonel Hodges as we were encountering the soil in the borrow pits, that it was not a soil

that the levee, as called for in the specifications, could be brought up to the full gross grade. (Tr. 289). McWilliams and I suggested a way in which that levee might be completed and brought up to gross grade and section, which was a very slow way of building a levee, but on account of the nature of the soil we had to do it in that manner, but defendant refused. (Tr. 291).

On account of the cypress stumps, in order to get sufficient dirt, we would go further out. This caused extra handling either with draglines, tractor or tractor wagons. (Tr. 279).

Preparations were made for the drainage. They kept channels open so that no water would at any time accumulate on the base of the levee. The top of the levee, every effort was made at all times to keep it in such condition that it would readily shed water after heavy rains. The pumps were always in operation, day and night. (Tr. 275, 276, qq. 104, 109).

Plaintiff was paid $80,640.05 by defendant, and expended on the work $257,422.88. (Tr. 258, 329, 330).

We sublet almost all of Section C and part of Section D to O'Mera. We sublet to Robison and Young,—the basing of the stations on which O'Mera was going to place the top part of the levee. We purchased six tractors and tractor wagons. (Tr. 267).

On July 9, 1932, the equipment on the job was one Page Dragline, 150 foot boom, with a 10 yard bucket; a Page [fol. 112] Dragline with 160 foot boom and 8 yard bucket; a Page Dragline with a 90 foot boom and 4 yard bucket; one P. & H. Dragline No. 700 with a 60 foot boom and 1 yard bucket; one P. & H. Dragline No. 400 with a 35 foot boom and ¾ cubic yard bucket. (Tr. 271). Later we had McWilliams Dragline machine, 125 foot boom and a 4 or 5 yard bucket, and L'Mera's 6-W Monegan 150 foot boom with a 6 yard bucket. (Tr. 272).

There was a large quantity of moisture in the soil of the borrow pits. I picked up some samples at random and tested them, and found the moisture content from 33⅓ to 40%, with the average 35% of moisture. (Tr. 279, 280).

[fol. 113] R. H. McWilliams, (Plaintiff's Witness; Tr. 419).

I am an experienced levee contractor acquainted with soil formations along the Mississippi Valley. (R. 168; Tr. pp. 420, 421, qq. 4-14).

The soil conditions were just what I would expect in that kind of country. (R. 168, Tr. 424-425, qq. 31 and 35).

Encountering cypress stumps in the borrow pits was not an unusual occurrence in the Mississippi Valley. (R. 168, Tr. 429, q. 58). The borings showed that soft clay material would be encountered, (R. 168; Tr. 439-440, qq. 97-101), and that they indicated that it was an undesirable contract to work on. (R. 168; Tr. 442, q. 119). On the sections of the contract where I worked there were no slides, although there were numerous slides on other portions of the contract work. (R. 168; Tr. 444-445, qq. 117-121).

The work might have been brought to gross grade and section in the contract period if good care had been used, (R. 168; Tr. 447, xq. 136), but plaintiff did not use good care. (R. 168; Tr. 447-448, xqq. 137-138). If plaintiff had started at the beginning of the contract, he could have completed the levee within the contract time. (R. 168; Tr. 450, xqq. 154-156).

To an experienced levee builder, the crop of heavy cane sugar which was on the land at the time of the invitations for bids, indicated that it lay above cypress stumps. (R. 175; Tr. 426-427, qq. 43-45).

A heavy combination of silt, sand and buckshot furnishes the most desirable materials to construct a levee. (Tr. 422, 423).

I leased plaintiff a machine in July 1932, and agreed to give him three days a week of my personal time in an advisory capacity. (Tr. 424).

It was a dangerous piece of work on account of the character of the soft material (R. 119; Tr. 459, q. 193); the levee could not have been completed within the contract time, 450 days. (R. 119; Tr. 430, 431, q. 61; Tr. 432, q. 64). The base should be put in one year and the top put on in another. [fol. 114] (Tr. 431-432, qq. 61-64). Taking this job as I found it, when I came there it would have been a dangerous proposition to have attempted to bring it to gross grade. It would have been impossible at that time (Tr. 454). The slope defendant required was not a practicable one. (Tr. 454, Adq. 174).

A fair value for placing the earth in the levee was 20 cents per cubic yard. (Tr. 441, qq. 103-104).

[fol. 115] JOHN KLORER, (Plaintiff's Witness, Tr. 471).

I had never seen the job until December 1932, at which time plaintiff had stopped work and had abandoned the contract. I went to the site of the work at the instance of plaintiff's surety in order to make a report on the general situation then existing. (R. 169; Tr. 473, q. 12). The slides could not be attributed entirely to the wetness of the material, but that if the contractor used bad methods of operation it could have been a potential cause of the slides. (R. 169; Tr. 482, 483, qq. 37, 38).

Where you have a cypress swamp you generally have a class of material that is water soaked, very ha-d to get the water out, that drains with difficulty. (Tr. 490).

A B-section would not be proper for a wet watery material with the characteristics found in that levee, such as found in the borrow pit, but that material if not wet could properly serve as a B-section levee. (Tr. 478, 479, q. 27).

There is nothing on the borings which indicated the fact or degree of wetness of the material (Tr. 481) or the existence of a cypress swamp. (Tr. 490, qq. 54-56). I do not think anyone including the Government engineers knew there was a cypress swamp there. (Tr. 490). Designation of soft clay indicates the presence of moisture, as it is the moisture which makes the clay soft. (Tr. 508).

[fol. 116] WILLIAM J. NEW, (Defendant's Witness; Officer in Charge; Tr. 774).

Plaintiff actually built some of the levee not only to the prescribed grade, but from 3 to 5 feet above it. Hardwick & Horton, the subsequent contractor finished the work in one year's time, (R. 169; Tr. 786, q. 44), and had no trouble in completing the job where they built from the ground up. It was only when they attempted to complete Ranieri's work that they encountered difficulties. (Tr. 786).

The new contractor who completed the levee started operations on July 11, 1933, and continued until July 1, 1934. (Tr. 785). He agreed to complete it in 240 days, but was obliged to take 115 days additional time. (Tr. 909, 910, q. 497).

Plaintiff impounded water, in a particular pool, to a depth of five feet between partial fills in the center of the levee. The bad feature of it is there are voids in the finished fill. (R. 171; Tr. 801, qq. 87-91). Notices charged that Ranieri over dug his inspectio- ditches, dropped his material from excessive heights and worked the soil during rain. (Tr. 808). We allow 25 per cent shrinkage on dragline fills to take care of shrinkage that occurs on account of these voids, and when rain is permitted to impound or fall on these fills, without any provision for drainage, naturally the water permeates the fills and fills a lot of voids, and that increases the water content of the material. (Tr. 801, q. 91).

Water was permitted to be on the levee base and in the muck ditches. (R. 171; Tr. 807, 808, qq. 108-110). Had the work been commenced promptly and properly executed, it would have been completed on time. (Tr. 782, 783, q. 34).

The height of the levee on Lots A, B and C was to be 33.7 feet, and at Lot D 29.4 feet. (R. 117; Tr. 885, 886, q. 379).

The two adjoining levees, with similar materials, but of less height, (Tr. 886), were completed in contract time without any difficulty. (Tr. 786, 787). Sometimes a difference of a foot or two in the height of the levee will determine [fol. 117] whether or not it will slide. (Tr. 882). Boring data would give good general idea of the type of soil to be expected, and the soil actually encountered was the same as the boring data showed. (Tr. 778, 779). There was sufficient material in the borrow pits to build the levee even allowing for the presence of the stumps. (Tr. 841).

After this job was started, after there were certain slides, additional borings were taken in the borrow pits, we analyzed the soil and made stability computations, and in the levee base, to see whether a levee of the height prescribed could be constructed with the available material. (R. 118; Tr. 833, 834, qq. 166, 167). That is the usual practice in our organization. (Id.).

Before the work was started plaintiff submitted his plan of operation and the machinery to be used. If his equipment were not adequate we had the right to withhold the awarding of the job to him. (R. 118; Tr. 889, 890, xqq. 400-403).

The exact area from which plaintiff was to obtain the material was not shown on the map. The specifications state that the material could be obtained from the riverside borrow pits. (Tr. 868, xq. 297, 298). It was in that area

that Ranieri had to take his material, and solely from that place. (Tr. 868, xq. 299).

I say that the material that Ranieri placed in the levee had a tendency to slough. I said that in many of our violation notices, and yet the only place that Ranieri could get material was from the borrow pits, designated by the Government. (Tr. 869).

A. We didn't require him to remove material because the material was not objectionable by the time it reached the levee. It wasn't in as good condition as it should have been, but the material itself was not objectionable in any form. (Tr. 870).

Q. So that this material that had a tendency to slough and slide was not objectionable?

A. The material itself was not. (Tr. 370, xq. 307).

[fol. 118] Q. Why did you hand him these certificates?

A. Because of the fact that the contractor had handled his work in such a way he rendered that material * * * he broke down its resistence to sliding and sloughing by the manner in which he prosecuted the work. (Tr. 370, xq. 308).

Material that has a tendency to slough and slide is apt to slough and slide * * *, but it isn't objectionable until you actually get a movement and the cleavage plane is broken within the embankment. (Tr. 872, xq. 318).

Q. Knowing that the material — was going into the levee had a tendency to slough and slide, couldn't you have avoided this by directing Ranieri to remove it? Was he paid for the removal of the material?

A. I think not, because that would have been a repetition of what we had originally. (Tr. 872, xq. 320).

The precipitation in 1932 was 20% more than the average. (Tr. 848-850, xqq. 218-223).

Material taken from the borrow pit is placed in the levee in one or two handlings by the machine, and the type of soil that was used here does not readily give up its moisture content. (Tr. 839).

There were some cypress stumps or trees found throughout the length of the job. (Tr. 917, q. 534). There was no unusual number however on Ranieri's job. (Tr. 835). Everyone expects to encounter some cypress stumps. (Tr. 791). Work was completed on similar projects where there were a lot of cypress stumps without undue delay or equipment breakage, and with equipment similar to Ranieri's. (Tr. 792).

When Ranieri encountered these cypress stumps to get the material that was displaced by the stumps, it was necessary to dig deeper, or go out further for the amount of material to replace the volume of the stumps. (Tr. 893).

There were always Government estimates, known as Government engineering estimates used in competition with contractor's bids, opened at the same time with the con- [fol. 119] tractors bids. They are the same thing as the contractors bidding on the work. The only difference is that the Government's estimate does not include profit, and the idea of allowing 25% over the Government's estimate, is to allow the contractor to make a legitimate profit. (Tr. 780).

The total base compression was 132,930 cubic yards on the work performed by plaintiff. (Tr. 467, q. 295).

McWilliams is an old levee builder about this section of the country, and a very good one. (Tr. 892).

There was never any foundation failure of the levee. (Tr. 810). There is nothing in the specifications against having water on the berm. (Tr. 852).

Ranieri had an excessive number of rehandles, and each rehandle cost Ranieri additional money. So, he had nothing to gain by rehandling this dirt more than he thought was absolutely necessary. (Tr. 903).

Around July 1932, there was a full river stage of the Mississippi. The level of the river was higher than the bottom of the borrow pits. (Tr. 861). It affected the amount of water in the borrow pits and soil there. (Tr. 861).

I am employed as Assistant Area Chief of the second Mississippi area by the War Department. I am an engineer in charge of all construction work in respect of levees within that area (Tr. 775-776). I have been engaged in levee construction work and flood control work on the Mississippi since 1927, and have had charge of the building of all levees constructed by the Government from Memphis to New Orleans. (Tr. 776).

My connection with the Ranieri contract was to see that the work was performed in accordance with the contract and specifications, and to perform the usual inspections, and the handling of reports. (Tr. 776.)

[fol. 120] H. A. Heusmann, (Defendant's Witness and employee; Tr. 596).

An engineer and a soil expert, worked for 10 years making soil studies, and all things pertaining to soil such as designing sections for levees, and preparing soil borings. (Tr. 597).

The borings chart showed that 34% of the materials were within the loam class. (Tr. 173; Tr. 601, q. 22). Loam consists of material which contains less than 30% clay particles and less than 80% sand particles. (Tr. 602). The soil found in the borrow pits was substantially similar (Tr. 611-618; qq. 56, 76), considering the classifications that the driller used, such as sand and silt, which makes loam. In other words, the driller had no analysis to classify his soils by. He just put sand and silt, and he made a mixture of both, evidently, that would result in loam. (Tr. 611, 612, q. 57). The material that was used and available for the construction of this levee was satisfactory material to build a levee. (Tr. 614).

The field men are instructed to take borings at intervals of 5 feet, and when there is a change in the strata, to take a sample of that at every change. (Tr. 608, q. 42).

The original borings were taken on 73% of the project, every 1000 feet. (Tr. 694).

There were 17 borings taken. They were each 2 inches in diameter, and represented an area of 54 square inches, and the pits were around 300 feet wide, and they were over 22,000 feet in length, and expressing it in percentages, it would give you one five-millionth of one per cent area, or the surface represented one five-millionth of a per cent of the borrow pit area. (Tr. 614, q. 64; Tr. 693, q. 354).

The second set of borings were taken 200 to 400 feet apart during the work. (Tr. 693).

In speaking of this material as being good for levee purposes, building to a certain degree and a certain height, is without reference to the length of time in which it would take to bring it up to that height. (Tr. 663, rxq. 288).

[fol. 121] I saw cypress stumps in these borrow pits, and I reported them, too, when I made drawings by using the cross-section of the spoil bank. I indicated the cypress stumps on it. I saw two of them out in the spoil bank area, right where the failure had occurred between the spoil bank. (Tr. 628). These cypress stumps in the borrow pits were

about 27 feet deep. (Tr. 631, q. 129; Tr. 704, qq. 411, 412). A stump would be anywhere from 3 feet to a maximum of about 8 feet in diameter at the base. (Tr. 687, q. 330; Tr. 710, q. 445). If it is an old cypress swamp and the *b*egetation has grown in there for quite a period, then you get clay, silt and sand deposited over it, and the organic content will be high. (Tr. 631, 632, qq. 128-131).

When there are cypress swamps they allow one-third more for wastage and subsidence. (Tr. 718, qq. 491-494).

[fol. 122] PHILIP S. FINN, (Defendant's Witness, and employee; Tr. 560).

In defendant's Exhibit 44, the Government's estimate for the work was $487,340. (Tr. 594, qq. 91-92).

The new contractor who completed the work was paid 18.60 cents per cubic yard. (Tr. 595, qq. 91, 92).

Rain on any levee construction job will indirectly affect the cost. And so will the moisture content of the soil within certain limits. If there is 30% of water lying on the ground, the contractor should not be working at that time. I know from my experiences as an engineer, the difficulty of moving wet earth into a levee. (Tr. 755, 756, q. 229).

[fol. 123] 10. The exhibits filed by plaintiff and defendant, to be filed with the Supreme Court of the United States as part of the record, *but not to be printed.*

S. Wallace Dempsey, Attorney for Plaintiff; Francis M. Shea, Assistant Attorney General; Paul A. Sweeney, Attorney.

[fol. 124] X. ORDER SETTLING RECORD

The plaintiff having filed a petition for writ of certiorari to the Supreme Court in the above-entitled case, and both plaintiff and defendant having requested that certain portions of the evidence which were agreed to by them, and which are att-ched hereto be included in the record to be certified to the Supreme Court, and the court having found that said portions are accurate transcripts of the original record material to errors assigned, the same are hereby this

16th day of September, 1942, approved as the record to be certified to the Supreme Court.

By the Court.

Richard S. Whaley, Chief Justice.

[fol. 125] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 126] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the Petitioner,

It Is Ordered that the time within which to file petition for certiorari in the above-entitled cause be, and the same is hereby, extended to, and including, October 29th, 1942.

Harlan F. Stone, Chief Justice of the United States.

Dated this 29th day of June, 1942.

[fol. 127] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION

It is hereby stipulated by counsel for petitioner and by the Solicitor General on behalf of the United States that the exhibits referred to in the Court of Claims special findings of fact and made a part thereof by reference (R. 86), and the other exhibits filed by the parties in said Court, (all exhibits having been made a part of the Agreed Evidence by the parties to be filed with the Supreme Court of the United States as a part of the Record, but not to be printed, as covered by the Order Settling Record), which have been withdrawn from the Court of Claims and filed with the Clerk of this Court, need not be printed, except the parts listed

below, but shall be considered a part of the Record, and may be referred to by the Court and by either counsel in the petition, briefs and on oral argument.

Exhibits C and D filed with defendant's counterclaim (R. 24-29) are not to be printed.

(1) The following parts of the Specifications, Exhibit E are to be printed:

(a) Paragraph 7-a, page 33 of Record.
(b) Paragraph 9, page 37 of Record.
(c) Paragraph 13, pages 38 and 39 of Record.
(d) Part of Paragraph 19, page 40 of Record.
(e) Paragraph 22-a, pages 43 and 44 of Record.
(f) Paragraph 24, pages 46 and 47 of Record.
(g) Paragraph 39, pages 54-60 of Record.

(2) The following parts of the Contract, Exhibit F, are to be printed:

[fol. 128] (a) Article 3, page 63 of Record.
(b) Article 4, pages 63 and 64 of Record.
(c) Article 7, first sentence on page 66 of Record.
(d) Article 9, pages 67 and 68 of Record.
(e) Article 15, page 70 of Record.
(f) Article 16-a-b-c, pages 70 and 71 of Record.

S. Wallace Dempsey, Counsel for Petitioner, 723 Investment Building, Washington, D. C. Charles Fahy, Solicitor General.

Endorsed on cover: File No. 46,964. Court of Claims. Term No. 463. Alex Ranieri, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed October 17, 1942. Term No. 463, O. T. 1942.

(23)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 463

ALEX RANIERI,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

S. WALLACE DEMPSEY,
Counsel for Petitioner.

BRUCE FULLER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 463

ALEX RANIERI,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner, Alex Ranieri, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled case.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered February 2, 1942. A motion for a new trial was overruled on June 1, 1942 (R. 43). The time to file a petition for a writ of certiorari was extended by the Supreme Court of the United States to October 29, 1942. The jurisdiction of this

Court is invoked under Section 3(b) of the Act of February 13, 1925, c. 229, § 3, 43 Stat. 939, as amended by the Act of May 22, 1939, *infra*, pages 2, 3.

Questions Presented.

(1) Whether the Court erred in failing and refusing to make material findings on material issues, and in making findings not supported by the evidence as described in Petitioner's Specification of Errors.

(2) How the Act of May 22, 1939, c. 140, 53 Stat. 752, is to be interpreted, particularly as to the meaning of the words "it shall be competent," and general as to the scope of the Act and the intent of Congress, and as determining the rights of the petitioner to a review and determination thereunder.

(3) Whether the Court erred in dismissing the petition, and awarding respondent judgment on its counterclaim.

Statute Involved.

> (b) In any case in the Court of Claims, including these begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.
>
> The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue. As amended May 22, 1939, c. 140, 53 Stat. 752.

(Amendment to Act of Feb. 13, 1925, c. 229, § 3, 43 Stat. 939, 28 USCA § 288).

Statement.

Petitioner contracted with respondent in October, 1931, to build a levee containing about 2,950,000 cubic yards on the Mississippi River for 12.4 cents per cubic yard.[1] Respondent agreed to furnish petitioner without cost the material for building the levee, from designated borrow pits,[2] "*of the best grade*",[3] "*clean earth, free from all foreign matter, which would not slough or show a tendency to slough*",[4] with the governing material loam for building a B-section levee of an average height of 31.5 feet.[5]

All the earth furnished was very wet and sloughy and practically no loam, filled with foreign matter and large cypress stumps, 3 feet below the surface to 27 feet, and 3 to 8 feet in diameter, and not any of it the kind respondent agreed to furnish. It was not part bad and the remainder good, but was all bad. There is no limitation of the bad condition to part only in the evidence, but all the descriptions of its condition as bad were unlimited, and general and

[1] Cts. Spec. Find. of Fact No. 1 (R. 30).

[2] R. 16; Sec. 13 of Specifications; R. 46, 53.

[3] R. 24; Art. 7 of Contract.

[4] R. 17; Sec. 22-a of Specifications.

[5] Cts. Find. No. 1; R. 31; R. 52.

applied to the whole. There was no earth such as respondent agreed to furnish which petitioner could "select" or pick out.[6]

A boring's chart was presented to petitioner which described the soil by its various names, but stated nothing as to the condition of the soil except that only 10%, on two of the four lots, was soft clay, and failed to show that the soil

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[6] (a) The soil was not in as good condition as it should have been, *NEW*, Deft's. officer in charge, R. 53; it did not readily give up its moisture content, Id., R. 53; it contained hidden cypress stumps and foreign matter, Id., R. 53, and there was no other material available, Id., R. 52, 53.

(b) Respondent had 142 written weekly Reports of each day's work made by its Inspector, 100 of which showed that the soil was wet, very wet, 14 that it was moist, and none of it dry; that the machines were idle most of the time on account of the bad condition of the soil for 160 days, and idle parts of practically every day; that there was no good material or of the type required; that the material was too wet; there was seepage; pumps had to be operated continuously, and that there was practically no loam (Deft's. Ex. 52 A-D).

(c) Respondent's answer alleges—"That much of this material * * *" (in the levee after handling and drying) "was totally unfit, * * * wet, * * * sloughing, * * * showed tendencies to slough, and was full of numerous slides and planes of cleavage" (R. 10).

(d) Respondent stated in 107 notices it gave petitioner that the material was wet and sloughy. Respondent stated in 8 letters that the material was wet, and showed a tendency to slough. No notice claimed that there was any better material which petitioner could have selected or picked out (Cts. Find. No. 4, R. 32).

(e) After the work started there were slides and additional borings were taken to see whether the levee of the height described could be constructed with the available material (*NEW*, R. 52).

(f) "Plaintiff ran into many difficulties in handling the soil in the borrow pits, encountering cypress stumps and other organic matter which caused damage to his machinery" (Cts. Opinion, R. 39), and respondent knew these conditions before the contract was let (R. 53).

(g) The material here was the worst encountered in 29 years of levee building, *O'Mera*, R. 43-45; it was a dangerous piece of work on account of the soft material, *McWilliams*, R. 50; the material was sloughy, and there was no other material, *O'Mera*, R. 43-45; the water content averaged 35%, *Armstrong*, R. 45, *Dee*, R. 40, cypress stumps in the borrow pits were 27 feet deep, 3 feet below the surface, and 3 to 8 feet in diameter, *HEUSMANN* (R. 55-56).

was wet and filled with foreign matter and cypress stumps.[7] The borings were made only at 1000 feet intervals and only over 73% of the site representing but one five-millionth of one per cent of the borrow pit area.[8]

Respondent approved previous to the work petitioner's plan of operation and his machinery.[9]

Petitioner was delayed constantly by the wet, sloughy material, and lost most of the time of 160 days and parts of every day,[10] and had 30 to 40% loss of time due to the cypress stumps which broke his cables and equipment,[11] and forced him to go further out to obtain material,[12] and to obtain extra machinery.[13] He protested about these conditions being different from what respondent represented, and its refusal to pay him a large sum due him for work.[14]

On December 12, 1932, there was due petitioner $71,342.51 even at the contract price, of which respondent admits it had no right to retain $23,317.16, but which it refused to pay petitioner who was in dire need of it.[15] He then notified respondent that he elected to rescind his contract due to said conditions, but that he would proceed if mutually satisfactory adjustments were made. Respondent, December 14, 1932, refused to make any adjustment, and notified petitioner to proceed with the work *under the terms of the contract.* Thereupon petitioner discontinued work.[16]

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[7] *Deft's. Ex.* 16; Note 6 above.
[8] *HEUSMANN,* R. 55.
[9] *Maxon,* R. 46.
[10] *Deft's. Ex.* 52 A-D; Note 6-b above.
[11] *O'Mera,* R. 44.
[12] *Dee,* R. 49; *NEW,* R. 54; *O'Mera,* R. 44.
[13] *Defts. Ex.* 52 A-D; *Cts. Find.* No. 5, R. 36.
[14] *Dee,* R. 48-49; *O'Mera,* R. 45; *Note* 15, *infra.*
[15] R. 14; Cts. Find. No. 8, R. 38.
[16] Cts. Find. No. 6, R. 36.

The fair and reasonable value of petitioner's work in placing 1,550,822 cubic yards in the levee,[17] at 20 cents per cubic yard,[18] and for other work performed by him is[19] $393,700.22, less the $80,640.05 paid[20] leaving $313,060.17 due him.

The Court found that there was sufficient satisfactory material to build the levee, dismissed the petition and gave respondent judgment on its counterclaim.[21]

Specification of Errors to Be Urged.

Petitioner urges that the Court of Claims erred in failing and refusing to make the following Special Findings of Fact requested by petitioner, viz:—

I.

(1) Respondent by the contract agreed that the (a) "earth for constructing the levee will be furnished without cost to the contractor" by defendant, and (b) that it should be "clean earth, free from all foreign matter", 'which

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[17] Deft's. Ex. 52 A-D; on March 5, 1933, Ex. 52-A; March 5, 1933, Ex. 52-B; March 10, 1933, Ex. 52-C; Feb. 20, 1933, Ex. 52-D.

[18] The Government's estimate as to value of work was 16 cents per cubic yard, plus 25% profit, making it 20 cents per cubic yard, or $609,175 for the total yardage, *NEW*, R. 54; *FINN*, R. 56. The other witnesses testified also that 20 cents was the fair value per cubic yard; *Dee*, R. 48; *McWilliams*, R. 51.

[19] Subsidence was 132,930 cubic yards, *NEW*, R. 54; 49-390 cubic yards slides cut and replaced, Deft's. Ex. 52 A-D, and 18; 12% or 186,098 cubic yards lost by being displaced by water in excavating, *O'Mera*, R. 44.

[20] *Dee*, R. 49.

[21] Finding 2, R. 31, 38.

Respondent did not claim in the Court below, and the Court did not make a finding of fact, that there was sufficient material of the type required by the contract and specifications to build the levee, but claimed that it was petitioner's duty to remove the foreign matter, such as cypress stumps from the soil, and to dry out the wet, sloughy soil before placing it into the levee (Deft's. Brief, p. 167, in Ct. Clms.).

would not slough or show a tendency to do so' and "be of the best grade", but respondent failed to furnish petitioner any earth of the kind stipulated and provided only very wet and sloughy earth, subject to slides, thickly pervaded with cypress stumps, reaching from 3 feet to 27 feet below the surface.

(2) Respondent presented to petitioner a borings chart, and represented thereby that it had made adequate borings, and that the only imperfection in the soil was about 10% soft clay, and respondent failed to show and concealed the bad condition of the soil, and that there were cypress stumps and foreign matter in the borrow pits, although it knew (but petitioner did not), that the borings were wholly inadequate and that the soil was in an unfit and bad condition, and as to the cypress stumps and foreign matter. Respondent approved petitioner's machinery as sufficient, although it was inadequate under conditions of which it knew.

(3) Petitioner relied upon respondent's said agreement to furnish soil of the kind stipulated, and on its said representations as to the borings and the conditions of the soil, and was misled thereby and by its concealing the existence of the cypress stumps and foreign matter, and the bad condition of the soil, and was induced thereby to bid 12.40 cents per cubic yard on constructing the levee when it was worth 20 cents per yard.

(4) The cypress stumps so obstructed the work and made it so difficult to secure soil that petitioner was forced to go further for earth than the contract provided, which necessitated much additional machinery, and a greatly increased cost for moving the dirt, but defendant insisted that plaintiff should still move the material at the contract price.

(5) Petitioner protested repeatedly to respondent its failure to furnish earth such as it agreed to supply, and its misrepresentations and concealments as to the condition of the soil, and requested adjustments, but struggled on until he had placed 1,550,822 cubic yards, which respondent Accepted, and which became a part of the completed levee, when, as his protests and requests were ignored, and because respondent refused to pay him money due him, he rescinded the contract.

(6) Respondent objected to rescission, but only on the grounds,—(1) that the rescission notice did not state how sub-surface conditions differed from the drawings, or those shown in the specifications, of which difference respondent was fully aware; (2) that petitioner should furnish proof as to how sub-surface conditions differed from the drawings or specifications, signed by two outside persons, neither of whom had any interest in rescission; and (3) that petitioner was expected to proceed with the work under the terms of the contract.

(7) The reasonable value of the work petitioner performed in moving and placing earth was 20 cents per cubic yard, and the work performed and its value in items were as follows, viz:

For placing 1,550,822 cubic yards of material in the levee $310,144.50.

For 132,930 cubic yards lost through subsidence $26,580.00.

For 49,390 cubic yards of slides which respondent required petitioner to cut and replace $19,758.00.

For a 12% loss through excavating and placing 186,098 cubic yards of water in the soil $37,219.72.

The total amount earned by petitioner was $393,700.22.
Petitioner was paid $80,640.05.
The balance now due petitioner is $313,060.17.

II.

The Court erred in making the following Special Findings of Fact, and Conclusions of Law:

(1) There was sufficient satisfactory material in the borrow pits and in the available sections of the old levee from which to construct a B Section, and the new levee was eventually successfully constructed from such sources with a B Section.

(2) About 2,000 linear feet out of 20,000 feet of an old levee were made available by the contract for the new levee construction and the remainder of the material was to be obtained from riverside borrow pits.

(3) There is no evidence that the borings were inaccurately charted.

(4) There is an absence of proof that respondent's officers at any time misrepresented conditions to the petitioner, either orally or in writing, or in particular through the plans or specifications.

(5) Petitioner could have satisfactorily completed the work with the material available and in the agreed time. His failure to do so was due to his own fault and negligence, to delay on his part in getting started in the actual handling of levee material, to his violation of the terms of the contract, and unsound practices in the handling of material. These unsound practices and contract violations related mainly to the handling and disposition of material when wet and tending to slough or slide, and the impounding of water in partial fills.

(6) In holding as a Conclusion of Law that petitioner is not entitled to recover against the respondent, and that respondent was entitled to a judgment on its counterclaim for $37,653.20.

Reasons for Granting the Writ.

The Court in failing and refusing to make the material findings on material issues described in the specifications of errors (hereinafter called S. E.), and in making the erroneous findings, also material and on material issues enumerated in said Specifications, violated the Rules of this Court (*U. S.* v. *Esnault-Pelterie,* 303 U. S. 26), and the Act of May 22, 1939, c. 140, 53 Stat. 752, *supra,* and the case should be remanded for additional and corrected findings (*Ripley* v. *U. S.,* 222 U. S. 144; *Universal Battery Co.* v. *U. S.,* 281 U. S. 580; *Luckenback S. S. Co.* v. *U. S.,* 272 U. S. 533, 539; *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201; *Seminole Nation* v. *U. S.,* 86 L. Ed. 980, 988, 992, 993), or the judgment should be reversed and judgment for petitioner as claimed be directed because "the subordinate or circumstantial findings made by the Court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustainable" (*U. S.* v. *Esnault-Pelterie,* 303 U. S. 26, 31) and is in conflict with the decisions of this Court as stated under C *infra,* pp. 14-17.

(A) The Court below found as evidentiary facts (R. 32-33, 39, 41) that the soil was wet, sloughy, contained cypress stumps and foreign matter (hereinafter called "Prohibited Soil"), although the contract and specifications required respondent to furnish free of cost to petitioner "*soil of the best grade, free from all foreign matter, which would not slough or show a tendency to slough", with the governing material loam for building a B-section levee* (R. 16, 17, 24; Notes 2-4 *supra,* p. 3). (Hereafter called Contract Soil).

In conflict with its evidentiary findings, and the substantial evidence, the court made the ultimate finding, not in issue, that there was sufficient satisfactory material in the borrow pits and in the available sections of the old levee to construct a B-section levee, and that the new levee was eventually constructed from such sources with a B-section (R. 31-32), and refused to make petitioner's requested finding on the material issue that there was no Contract Soil furnished (S. E. 1).

(1) The Court's evidentiary findings made in its findings of fact, and in its opinion (which as the meaning is ambiguous may be resorted to in determining what it meant by "satisfactory material", *American P. & Mfg. Co.* v. *U. S.*, 300 U. S. 475, 480; *Chippewa Indians* v. *U. S.*, 305 U. S. 479, 481), clearly show that the "satisfactory material" was prohibited soil, as follows:

(a) Respondent served 40 notices on petitioner that the material furnished petitioner was wet, and 67 like notices that it showed a tendency to slough (R. 33); that it notified petitioner in writing on eight occasions that the soil was wet, showed a tendency to slough and did slough (R. 33-34). No claim was made by respondent then or thereafter that there was any other material available.

(b) That petitioner "ran into many difficulties in handling soil from the borrow pits, encountering cypress stumps and other organic matter, which caused damage to his machinery", and that "he had difficulties with sloughs and slides" (R. 39).

(c) That an investigation would have shown that "wet soil probably would be encountered"; "that it was not unusual to encounter cypress stumps; that water and such stumps are frequently found in that section" (R. 41);

(Clearly Prohibited Soil, and not shown on respondent's borings chart).

(d) That respondent agreed to furnish sufficient Contract Soil to build a B-section levee (R. 41), but all the 168 Inspection Reports (Deft's. Ex. 52 A-D) but 2 show that there was no loam, (the soil required for this steep B-section).

(2) The undisputed evidence also shows that the only material was sloughing wet material containing numerous large cypress stumps and organic matter,—Prohibited Soil, which petitioner protested but was required to use by respondent (R. 43-44; Note 6, *supra*, p. 4), and,—

(a) Contrary to the Court's finding that "2000 linear feet out of the 20,000 feet of the old levee were made available by the contract for the new levee" (R. 31), such was not provided for by the contract, map or drawings, and petitioner was required to obtain his "material *solely* from the riverside borrow pits" (New, Deft's. officer in charge, R. 52-53), and was prevented from approaching and obtaining soil within a certain limit of the old levee (R. 46).

(3) The new contractors were paid once and a half petitioner's price, and took once and half the time stipulated (R. 51, 56); which proves that the soil was not "satisfactory", and that the levee was not completed in a satisfactory manner.

The material issue (on which petitioner requested findings, S. E. 1) was whether there was sufficient Contract Soil, and if not, whether petitioner suffered damages, and not whether there was "satisfactory material," or whether it was physically possible to construct the levee as it was constructed in once and a half the time stipulated, and at once and a half petitioner's contract price.

The relation of the parties is substantially that of seller, respondent, and of buyer, petitioner, and the cases hold the word "satisfactory" means so to the buyer. That the soil was not "satisfactory" to petitioner is shown by his notice of rescission (Finding by the Court), made because the soil was different from what it was represented,—because he was dissatisfied with it (R. 36).

(B) The Court erred in refusing to make petitioner's requested findings (S. E. 2, 3, 4), that the borings chart misrepresented and concealed the true conditions of the soil, damaging petitioner, and in making the erroneous ultimate findings,—(1) that there was no evidence that the borings were inaccurately chartered (R. 32); and (2) that there was no proof that respondent's officers at any time misrepresented conditions to the petitioner, either orally or in writing, or in particular through the plans or specifications (R. 37).

These erroneous findings are overridden by the evidentiary findings, as well as by undisputed evidence, that the soil was wet, showed a tendency to slough, and contained cypress stumps and foreign matter, none of which was shown on the chart ("A" above; Deft's. Ex. 16).

(a) The borings were inadequate, made at 1000 foot intervals over only 73% of the levee, and amounting to only one five millionth of one per cent of the pit area. After work was started, slides made new borings necessary at 200 to 400 feet intervals, and soil analysis and stability computations to see whether the levee could be constructed with the material (Notes 8, 6-e, *supra*, p. 5,).

(b) The chart represented that only about 10% of the soil was soft clay, but the undisputed evidence shows that all of the soil was wet. (See "A", *supra.*)

(C) Petitioner's requested findings, and the erroneous findings made by the Court were on material issues for the following reasons:

(1) As respondent agreed to furnish the "Contract Soil" (R. 16, 17, 24), it was a condition precedent which should have been but was not *exactly* performed (5 Page on Contracts, § 2958, ps. 5222, 5223; 3 Williston § 657, ps. 1940, 1941; *Philadelphia Etc. R. R. Co.* v. *Howard,* 13 How. 307; *Norrington* v. *Wright,* 115 U. S. 188; *McPherson* v. *San Joaquin Co.,* 124 Cal. xvii, 56 P. 802). Respondent's breach of said covenant entitles petitioner to recover his damages. (Id.; *Christie* v. *U. S.,* 237 U. S. 234; *Hollerbach* v. *U. S.,* 233 U. S. 165).

(2) Failure to show cypress stumps in the borings chart entitled petitioner to recover his damages. In *Christie* v. *U. S., supra,* the contractors recovered damages because the borings did not show sunken logs although the contractors "admitted that they had reason to and did expect to encounter some logs". Here respondent, by its experiences in building levees in the locality, expected hidden stumps (R. 53), while petitioner with no experience could not anticipate them (R. 31).

Failure to state that the material was wet, and pervaded with foreign matter were material concealments: In *Christie* v. *U. S., supra,* describing material as sand and gravel without stating that they were cemented together was held a material concealment.

(3) The representation in the boring chart that only 10% was soft clay (Note 7, *supra,* p. 5) was a misrepresentation and concealment, as it was all wet, entitling petitioner to recover. (*Christie* v. *U. S., supra; Hollerbach* v. *U. S., supra.*)

(4) The insufficient borings, representing only one five-millionth of one per cent ("B") above), was a deception, entitling petitioner to rescind the contract. (*U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1, 12).

(5) The insufficient borings chart was accentuated by approval of petitioner's plant (R. 46), "which was assurance that the chart was correct, and justification of reliance on it" (Id.).

(6) Petitioner had the right to rely upon respondent's agreement ((1) above), and that the boring chart did not show stumps, organic matter, or wet soil, without making an investigation. (*Hollerbach* v. *U. S., supra; Christie* v. *U. S., supra.*)

(7) The Court in its opinion (R. 41) in attempting to bolster its finding that the soil was "satisfactory" erroneously held that it was petitioner's duty to select the Contract Soil, and that there was sufficient soil of that type to build the levee. This statement is contrary to all the evidence, as there was no Contract Soil as shown under A above.

Moreover, even if the findings quoted showed that there was soil of the type promised mixed with the cypress stumps, organic matter, and wet and sloughy soil, petitioner was not bound to select it from this mass. (*Norrington* v. *Wright, supra.*)

(8) Respondent contended by its answer and throughout the work by serving 107 notices that the soil was unfit, and that petitioner was required to make it fit (Note 6, *supra*, p. 4), and is estopped thereby from changing and claiming that this bad soil was "satisfactory". (*Ohio & M. R. Co.* v. *McCarthy*, 96 U. S. 258; *Connery Coal Etc. Co.* v. *Comr. Int. Rev.*, 84 F. (2d) 485, 487).

(9) Refusal to find that petitioner relied on respondent's agreement to furnish Contract Soil and its representations as to the borings and the condition of the soil, and was misled thereby and by its concealing the existence of the cypress stumps and the bad condition of the soil (R. 39), and was induced thereby to bid 12.40 cents per cubic yard for work worth 20 cents per yard (Note 18, *supra*, p. 6), was refusal of a material finding on a material issue, established by the evidence. (*Hollerbach* v. *U. S.*, *supra*; *Christie* v. *U. S.*, *supra*.

(10) Refusal to find that cypress stumps so obstructed the work and damaged the machinery (so stated in the Court's opinion, R. 39), and made it so difficult to secure earth that petitioner was forced to go farther out than the contract contemplated (R. 44, 49, 54), necessitating additional machinery (R. 36), and increasing the cost, but that respondent insisted that petitioner should still work at the contract price (R. 36), was a refusal of a material finding on a material issue, the evidence as to which was undisputed, entitling petitioner to abandon the work and recover. (*Cotton Co.* v. *U. S.*, 87 Ct. Cls. 563; *Wood* v. *Ft. Wayne*, 119 U. S. 312, 322.)

(11) Refusal to find that petitioner protested respondent's failure to furnish the earth it promised, and its misrepresentations and concealments of the condition of the soil, and requested adjustments, and that petitioner placed 1,550,822 cubic yards which respondent accepted and it became part of the completed levee, but that respondent ignored petitioner's protests and requests, and refused to pay money due him, because of which he rescinded the contract (Notes 2-18, *supra*, ps. 3-6), was refusal of a material finding on a material issue, established by undisputed evidence, entitling petitioner to recover. (*Dermott* v. *Jones*, 23 How.

220, 235; *Guerini Stone Co.* v. *P. J. Carlin Constr. Co.*, 248 U. S. 334, 344; 12 Am. Jur. § 440, ps. 1021, 1022.)

(12) Refusal to find that respondent objected to rescission but only on the ground that the notice did not state how the subsurface conditions differed from the drawings or specifications (R. 10-11), which difference it knew (Deft's. Ex. 52 A-D), and that petitioner should furnish proof as to this by two persons not interested in rescission, was refusal of a material finding on a material issue, established by undisputed evidence.

Respondent is confined to the objections it made, which were invalid. Rescission became effective through the objections being invalid. (*Ohio & M. R. Co.* v. *McCarthy*, 96 U. S. 258.)

(13) The failure and refusal to find that the fair value of the work performed by petitioner and described in the Specification of Errors Numbered 7 was $393,700.22
on which he has been paid only $80,640.05
and that there is still due him $313,060.17
was refusal to find a material finding on a material issue established by undisputed evidence. (S. E. No. 7; Notes 17-20, *supra*, p. 6.)

(D) As respondent is in default for performance of a precedent condition to furnish the Contract Soil, it was not entitled to recover on its counterclaim, and its claim that petitioner did not perform the work in a workmanlike manner or in accordance with the contract provisions is no defense.

(1) Respondent agreed to furnish the material and inserted a provision in the contract drawn by it that it must be clean earth, free from all foreign matter, which would not slough or tend to do so, and be of the best grade (R. 16,

17, 24). On these facts, respondent became bound to furnish the material of the kind and in the condition it required it to be used. (*Philadelphia, etc., R. R. Co.* v. *Howard,* 13 How. 307.)

(2) The obligation to furnish such soil was a condition precedent (Id.; 5 Page on Contracts, § 2958; 3 Elliott § 2044; *Norrington* v. *Wright, supra*), which respondent was required to perform exactly. (*Norrington* v. *Wright, supra; Anvil Mining Co.* v. *Humble,* 153 U. S. 540, 552; 3 Williston, § 675.)

(3) Respondent did not furnish material of the kind and in the condition it required it to be used. The court below finds that the material was wet and showed a tendency to slough; that there were slides due to wet material, and other slides due partly to wet material (Findings of Fact, R. 32, 39); that petitioner "ran into many difficulties in handling the soil from the borrow pits", "with sloughs and slides and in encountering cypress stumps and other organic matter, which damaged his machinery". (Opinion, R. 39).

The evidence shows, without dispute, that the soil was all unfit, and showed a tendency to slough (Note 6, *supra*). So, respondent failed not alone to perform its precedent condition exactly, but it failed altogether, and therefore it cannot recover damages against petitioner. There was no loam, the soil required for this steep B-section (Inspector's Reports).

"The party who is in default for performance of a precedent covenant cannot recover damages from the adversary party for his default in performance of subsequent covenants." (5 Page on Contracts, § 2960, ps. 5226, 5227, 5228; *Norrington* v. *Wright, supra.*)

As appears, from the above, the following findings are in conflict with the rule as to exact performance of a condi-

tion precedent, and contrary to the evidence and erroneous, viz,—

"Petitioner could have satisfactorily completed the work with the material available and in the agreed time. His failure was due to his own fault and negligence, to delay, to his violation of the contract, and unsound practices, mainly the handling material when wet and tending to slough or slide, and the impounding of water in partial fills." (R. 37; S. E. No. II-5.)

This finding first charges that petitioner was at fault and negligent, but follows this with a description as to how he was so, stating that he handled material when wet and tending to slough or slide, but not that there was any other kind of soil, and from the Court's findings it appears that there was none; and likewise the finding does not charge that the impounding of water could have been avoided. The Daily Reports (Deft's. Ex. 52 A-D), fail to charge that petitioner was at fault in either of the two respects charged.

From the above it appears that the judgment on the counterclaim in point of law is not sustainable. (*U. S.* v. *Esnault-Pelterie, supra.*)

(E) The findings, the undisputed evidence and equity all, it is urged, more than justify reversal of the judgment, and judgment for petitioner for his claim because petitioner placed 1,550,822 cubic yards of earth (Inspector's Reports, Deft's. Ex. 52 A-D), which became part of the completed levee, and respondent proved that the work was worth the 20 cents per cubic yard, which petitioner claims (Note 18, p. 6, *supra*), and petitioner was induced to bid an inadequate amount by the broken condition precedent and respondent's concealments and misrepresentations as to the nature and condition of the soil. Petitioner's claim is therefore just. He has been deprived of working capital

and consequently of the ability to pursue his contracting business since 1929,—for 13 years,—and he will lose interest for that prolonged period. Should he be made to suffer a longer delay?

Conclusion.

The Court of Claims clearly erred in failing to make findings on material issues, and in making erroneous findings not supported by substantial evidence, and the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact, and show that the judgment in point of law is not sustainable, and is in conflict with all the many pertinent decisions of this Court as hereinabove described. It is respectfully urged that this Petition for a Writ of Certiorari should be granted.

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No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1942

ALEX RANIERI, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 38–42) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered February 2, 1942 (R. 42). A motion for a new trial was overruled June 1, 1942 (R. 43). On June 29, 1942, the time within which to file the petition for writ of certiorari was extended by order of the Chief Justice to October 29, 1942 (R. 57). The petition for writ of certiorari was filed October 17, 1942 (R. 58). The jurisdiction of this Court was invoked under Section 3(b) of

the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether there is lack of substantial evidence to sustain certain findings of fact made by the Court of Claims; whether ultimate findings of fact of the court are inconsistent with the evidentiary or primary findings; and whether the court failed to make findings of fact on the material issues.

2. Whether, under a contract calling for the construction of a levee by petitioner, the United States undertook to furnish petitioner clean earth, free from all foreign matter which would not slough or show a tendency to do so and be of the best grade, or whether it merely agreed to make earth available out of which petitioner was required to select the proper type for the construction of the levee.

3. Whether the United States made any material misrepresentation as to the character of earth available or as to the subsoil conditions which existed in the borrow pits from which petitioner was required to take the soil with which to construct the levee.

STATEMENT OF FACTS

This case involves a suit by petitioner against the United States for the recovery of $258,880.49 claimed to be due on account of construction work

(R. 1–8). The United States filed a special answer denying the sum was due (R. 8–12) and a counterclaim for $37,653.20 (R. 12–15).

The facts as found by the Court of Claims (R. 30–38) and as shown by the evidence may be summarized as follows:

Petitioner and the United States entered into a contract dated October 12, 1931, whereby for a consideration of 12.4 cents per cubic yard petitioner agreed to "furnish all labor and materials, and perform all work required for the construction of Item R 831, Chamberlain-Lobdell Levee, Lots A, B, C, and D, containing approximately two million nine hundred and fifty thousand (2,950,000) yards, situated in the Atchafalaya Front Levee District," in accordance with specifications, schedules, and drawings, all made part of the contract (R. 30–31). The levee to be constructed extended for a distance of about 22,000 feet (R. 31). The contract provided that work was to be commenced on each of the four lots within twenty calendar days after the date of receipt of notice to proceed and was to be completed within 450 calendar days from the date of receipt of such notice (R. 31). On October 30, 1931, petitioner received notice to proceed, thereby fixing the completion date as January 22, 1933 (R. 32). Within the contract time petitioner commenced the preliminary work of clearing, grubbing, and plowing, which required about one week's time

(R. 32). He commenced the placing of material in the levee on lots A, B, C, and D, 103, 228, 298, 366 days, respectively, after the receipt of notice to proceed (R. 32).

Under Section 13 of the specifications the Government agreed to furnish the right-of-way and earth for the construction of the levee without cost to the contractor (R. 16–17) and under Article 39 of the specifications the material for the work was to be obtained from riverside borrow pits and from the existing levee to the extent indicated in the drawings which the court below found to be 2,000 linear feet (R. 31). Paragraph 19 of the specifications (R. 17) stated that the soil conditions indicated that a B section was required throughout.[1] There was sufficient satisfactory material in the borrow pits and in the available sections of the old levee from which to construct a B section (R. 50, 51, 52, 55), and the new levee was eventually successfully constructed from these sources (R. 31–32; 52).

Borings had been taken over the site of the proposed levee at intervals of 1,000 feet each to a depth of about 25 feet and a chart of these borings appeared on the contract map (R. 31). The chart classified the earth disclosed by the borings as sandy loam, sandy clay, sand and loam, clay, loam,

[1] A B section was described as having "a crown of 10 feet, a riverside slope of 1 on 3½, the landside slope as containing a seepage line of 1 on 6½, and the governing material as loam" (R. 31).

sand and silt, clay and silt, brown clay, soft brown clay and sand, soft blue clay, hard blue clay, and soft brown clay (R. 31; 55). There was no evidence to show that the borings were inaccurately charted (R. 32).[2] Prior to the submission of petitioner's bid he had been furnished the contract map and specifications and his representatives visited and inspected the site of the proposed levee (R. 31; 46, 48).

The petitioner had no experience in building levees (R. 31). In the course of the work, Government inspectors served 231 notices upon petitioner of his departures from contract requirements, including the overdigging of borrow pits, impounding water between partial fills, placing wet materials and materials showing a tendency to slough on the embankment, improper preparation of foundations, leaving the foundation base wet, and digging inspection ditches to excess of width and depths (R. 32; 52). The contracting officer on numerous occasions called petitioner's attention to the harmful practices of like character in which he was engaging (R. 33–34), directed him to correct these practices, and advised him that he would be held responsible for resulting damage to the levee (R. 34–36).

On September 15, 1932, the contracting officer notified petitioner in writing that the progress of

[2] The evidence conclusively established that the material actually encountered corresponded closely to that disclosed by the borings (R. 55).

the work was unsatisfactory and demanded the use of additional equipment. On October 14, 1932, he repeated these demands, pointing out the harmful practices in which petitioner was engaged, and advising petitioner the embankment already installed was not considered entirely satisfactory for completion and that no further partial payments would be made for incomplete embankments on Lots A and B (R. 34–35). At no time did petitioner appeal from the decision of the contracting officer to the Secretary of War (R. 36). On December 12, 1932, petitioner ceased work on the project and by letter advised the contracting officer that it elected to rescind the contract, contending that subsurface or latent conditions at the site differed materially from those represented in the plans and specifications (R. 36). On that date petitioner had completed about 45 percent of the required work and had exhausted about 91 percent of the contract time (R. 37). The contracting officer replied on December 14, 1932, denying the right of petitioner to rescind the contract and demanding resumption of operations (R. 36). Operations were not resumed and the contracting officer, on January 3, 1933, terminated the petitioner's right to proceed under Article 9 of the contract (R. 36–37). The work remaining to be done was relet by advertisement to other contractors who successfully completed the work at an excess cost to the government of

$108,995.71 (R. 37–38). At the time petitioner abandoned work there was retained the sum of $71,342.51 making the net excess cost to the United States of completing the levee $37,653.20 (R. 38).

The Court of Claims made an ultimate finding that plaintiff could have satisfactorily completed the work in the agreed time with the material available and that his failure to do so was due to his own fault and negligence, to delay on his part in getting started in the actual handling of levee material, to his violation of the terms of the contract, and to unsound practices in the handling of material (R. 37).

After making the foregoing findings of fact the court directed that the petition be dismissed and entered judgment for the United States on its counterclaim in the sum of $37,653.20 (R. 42). Petitioner's motion for a new trial was overruled (R. 43).

ARGUMENT

Petitioner contends that the court below made findings of fact which were not supported by evidence, that evidentiary findings of fact are inconsistent with its ultimate findings of fact, and that it failed to make findings of fact in respect of material issues. Petitioner also contends that under the terms of the contract and specifications the United States undertook to furnish him clean earth, free of all foreign matters, which would not

slough or show a tendency to slough and would be of the best grade. Finally, he contends that the Government misrepresented the working conditions which would be encountered at the site of the construction of the levee. We submit that these contentions raise no substantial issue and are without merit.

1. The finding that sufficient satisfactory soil was available for the construction of the levee was correct. The evidence disclosed that there was suitable material with which to construct a B section levee of which the governing material is loam (R. 55). The uncontradicted testimony of the government expert discloses that loam is a mixture of earth containing less than 30 percent of clay particles and less than 80 percent of sand particles (R. 55). Clearly there was enough clay and sand available to furnish suitable material for this type of construction [3] (R. 55). Moreover a subsequent contractor was able to complete the building of the levee (R. 51); the levees adjoining at both ends the one here in controversy were completed within the contract time and without difficulty (R. 52); and witnesses testified that the work could have been performed within contract time (R. 50, 52).

[3] The presence of a large amount of clay (buckshot) would permit the construction of a B section since buckshot is suitable even for the construction of an A section, the sidewalls of which have a sharper angle than a B section (Specification 19, R. 17; 50).

Petitioner also contends that it was entitled to a finding that all the material supplied was wet and showed a tendency to slough. The record, however, discloses that this condition of the material was brought about by the faulty methods of construction employed by petitioner (R. 34–35, 53). Any type of soil if allowed to become sufficiently impregnated with water will become wet and if improperly handled it will show a tendency to slough (R. 52–53). Rains and seepage were common occurrences in the part of the country where petitioner undertook to construct the levee. It was his duty to provide adequate drainage to minimize the water content and to handle his material in such a manner as to reduce the possibility of sloughing to a minimum (R. 34–35, 52–53). This he did not do. The fact that other contractors completed their work out of the material at hand (R. 51, 52) and that the expert witnesses testified that the work could be completed with the material available (R. 50, 52) warranted the court below in refusing to make the finding to which petitioner claims he is entitled.

The evidentiary facts found by the court below are not inconsistent with its ultimate findings in respect of the character of the earth. The evidentiary findings were to the effect that the petitioner unnecessarily permitted material to become wet and placed wet soil and soil which had a tendency to slough in the levee (R. 32–35). Such find-

ings, however, relate to the manner in which petitioner performed his work. They plainly are not inconsistent with the ultimate findings that there was material which was satisfactory (R. 37).

Petitioner was not therefore entitled to his requested findings,[4] and the findings of the court below to which he excepts are all supported by adequate evidence.[5]

2. Petitioner erroneously contends that the United States agreed to furnish him with earth for the construction of the levee which should be "clean earth, free from all foreign matter, which would not slough or show a tendency to do so and be of the best grade." The United States undertook, by Paragraph 13 of the specifications, only to furnish without cost to the contractor the right-of-way and earth for constructing the leevee (R. 16–17). Article 7 of the contract provides that all workmanship, equipment, materials, and ar-

[4] If it were material petitioner might have been entitled to a finding that he encountered cypress stumps in the borrow pits. Such a finding, however, would necessarily have to be coupled with a further finding that the presence of cypress stumps in borrow pits was common occurrence (R. 50, 53) which should have been expected and that their presence was not such as to interfere with the successful conclusion of the work (R. 53). Accordingly, the failure of the court to make a finding in this respect is immaterial since the conclusion cannot be affected by it.

[5] In the statement of facts, *supra*, record references to the evidence which supports the findings of the court below are given in addition to the record references of the findings themselves.

ticles incorporated in the work covered by the contract are to be of the best grade of their respective kinds for the purpose (R. 24). Clearly this was an obligation placed upon the contractor and not one assumed by the United States. Section 22a of the specifications which set forth the manner in which the contractor should construct the embankment provided that the contractor should use clean earth free from all foreign matter in constructing the levee and that no earth which sloughs or shows a tendency to slough shall be placed in the embankment (R. 17–18). These also clearly are obligations which were placed upon the contractor whose duty it was to select from the material at hand, which the United States undertook to furnish, suitable material. As the court below found (R. 37), there was suitable material available for the construction of the levee, and the failure of the petitioner to select that material, not the failure of the United States to provide such material, caused petitioner's losses.

3. Petitioner's contention that the United States misrepresented the character of the soil to be encountered and the working conditions is without merit. At intervals of 1,000 feet along the base of the levee borings were taken to disclose the character of the material present (R. 55). As the court below found (R. 32) these borings were accurately charted and properly reflected the condition of the soil to be encountered. There

was no obligation on the part of the United States to take any borings at all, and having taken the borings its sole duty, which it fulfilled (R. 31), was to make available to the contractor the information which it had obtained. Moreover, there was no misrepresentation of any material facts by any failure of the Government to disclose facts of which it had notice. Whether cypress stumps would be encountered was a matter which the contractor was as capable of anticipating as the Government officials. Although there is testimony to indicate that the character of the vegetation growing on the borrow pits was sufficient to warn of the fact that there may have been an underlying cypress swamp (R. 50), other evidence would support a finding that no one could know if cypress stumps were present (R. 51). In either aspect, however, petitioner was placed upon the same notice as were the officers of the United States. The prevalence of rainfall and the fact that drainage might have to be maintained were a notorious fact which was open for all to see. It was a condition reasonably to be expected and no duty existed on the part of the government to call it to the bidder's attention. Nor was there a warranty by the United States of the working conditions which would be encountered. Only where the United States either represents itself as having knowledge which it does not possess or fails to convey information as to hidden conditions which it does possess is it held to war-

rant subsoil conditions. *Hollerbach* v. *United States*, 233 U. S. 165, 172; *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, 10–11.

Even assuming that subsoil or latent conditions existed which neither party to the contract had in contemplation, it was the duty of the contractor under Article IV of the contract (R. 23–24) to proceed with the work and seek an equitable adjustment under Article III (R. 23) for the increased costs of the work. But petitioner did not seek his remedy by the procedure thus prescribed but instead sought to rescind the contract when he became dissatisfied with working conditions (R. 36). He is not now entitled to the benefits of clauses in the contract with which he failed to comply. See *United States* v. *Rice and Burton*, No. 31, decided November 9, 1942.

CONCLUSION

The decision below is correct. We respectfully submit therefore that the petition for a writ of certiorari should be denied.

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No. 463.

IN THE

Supreme Court of the United States

October Term, 1942.

ALEX RANIERI,
PETITIONER,

v.

THE UNITED STATES.

REPLY BRIEF FOR PETITIONER.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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I.

Errors in Respondent's Statement of Facts, and Argument.

Respondent summarizes the findings, giving citations claimed to but which do not support them, and in so doing states as facts matters contrary to conclusive evidence offered by respondent itself, and omits convincing parts of evidence, giving a wholly different aspect to questions at issue, as follows:

1. As to progress in the work, (Rspdt's Brf. ps. 3, 4, 8), respondent admits that petitioner commenced work promptly (*Id.* p. 3),—he was excavating and placing material to

dry November 16th, 1931. Petitioner was forced to work on different lots at different times because of the wetness of the material, working at the one least wet, and going from one to the other as they were less wet. (Deft's. Ex. 52 A-D, its Work Record.[1]) Respondent objected to placing sloughing material. Petitioner replied that there was no other soil, and respondent directed petitioner to proceed and not shut down. (R. 44.)

All claims that petitioner did not accomplish work as fast as he should have are more than overcome by the fact that he lost most of 160 days, (half the period he was engaged in the work), and parts of every day through the bad condition of the soil, as respondent proved. (Deft's. Ex. 52 A-D.)

2. As to the finding that,—

> "There was sufficient satisfactory material in the borrow pits and in the available section of the old levee from which to construct a B-section". (pp. 4, 8 of Rspdt's. Brf.)

The material was to be obtained solely from the borrow pits, and not from an existing levee. (Ptn. p. 12; R. bot. p. 52, top pp. 53, 46.)

Respondent's citations to sustain this finding fail to support it, and on the contrary contradict it:

McWilliams, (whom New, the officer in charge, testified was an old levee builder and *a very good one,* (R. 54)), swore that the soil was so bad as to be dangerous, and that

[1] Exhibit 52 A, B, C and D, filed by respondent, and made a part of the Record herein, is its written Weekly Report for each day's work on Lots A, B, C, and D, showing weather, soil conditions, "any event of importance," and "Remarks". An abstract of this Report is filed in the Appendix.

the work could not have been completed in the contract time.[2]

Klorer swore that where there was a cypress swamp, as here, the soil is water soaked, very hard to get the water out, and drains with difficulty, and that as the material was wet it would not serve for a B-section levee. (R. 51.)

New, the officer in charge, testified that slides after the work was started, made it so doubtful whether the levee could be built with the only material available that new and adequate borings became necessary, with soil analysis and stabilization computation. (R. 52.)

He states that there was sufficient soil in the pits to build the levee "even allowing for the presence of the stumps", but not that the soil was satisfactory. *(Id.)*

He says that the soil was not in as good condition as it should have been; that it had a tendency to slough; that it did not readily give up its moisture content; and that there were cypress trees found throughout the length of the job. (R. 53.)

Huesmann, (an expert witness), testified that the soil used and available was satisfactory to build a levee, but he did not say a B-section levee, and he qualified this by adding that the statement was without reference to the

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NOTE 2:

It was a dangerous piece of work on account of the character of the soft material; the levee could not have been completed within the contract time, 450 days. The base should be put in one year and the top put on in another. Taking this job as I found it, when I came there it would have been a dangerous proposition to have attempted to bring it to gross grade. It would have been impossible at that time. The slope defendant required was not a practicable one. (R. 50.)

length of time it would take to bring it up to its height and grade. (bot. R. 55.)

Moreover, his opinion is based on the showing of the borings chart that 34% of the soil was loam, whereas 140 out of 142 inspection reports show that there was no loam. (Deft's. Ex. 52 A-D; R. 55.)

He testified further that he saw cypress stumps 27 feet deep in the pits, and if it is an old cypress swamp and the vegetation has grown in there for quite a period, you get clay, silt and sand deposited over it, and the organic content will be high. When there are cypress swamps they allow one-third more for wastage and subsidence. (R. 56.)

So, as stated above, the testimony of the four witnesses cited by respondent show beyond question that all the available soil was "totally unfit".

That the soil not "satisfactory" but was totally unfit, very wet, sloughy, permeated with cypress stumps and organic matter (Soil prohibited by Sects. 22-9 and Art. 7, R. 17, 18, 24) was conclusively proved also and almost wholly by respondent itself, as appears in detail in Note 6, p. 4 of the Ptn., and Appendix, *infra*.

The claim is, too, in conflict with,—(1) Respondent's work record, (which is conclusive that), petitioner lost half his time through the material being bad (Deft's. Ex. 52 A-D); (2) the 142 Record reports, which prove that the material was in bad condition,—very wet *(Id.)*; (3) the 107 notices respondent gave petitioner that the material was bad (R. 32); and (4) with respondent's answer that the material was "totally unfit" (R. 10), as well as (5) the finding in the opinion that

"plaintiff ran into many difficulties in handling * * *" (it), "encountering cypress stumps and other organic matter which caused damage to his machinery", and "he" (petitioner) "also had difficulty with sloughs and slides". (R. 39.)

Respondent is estopped,—through its oft repeated contention, continued throughout the progress of the work and the trial that the soil was "totally unfit" (Ptn. Note 21, p. 6),—from now contending that it was "satisfactory", (Ohio & M. R, Co. v. McCarthy, 96 U. S. 258; Ritter v. U. S., 28 F. (2d), 265, 267).

3. As to the finding that,—

"The new levee was eventually constructed from these sources,—the borrow pits and the old levee". (p. 4 of Rspdt's. Brf.)

The new contractors were paid once and a half petitioner's price, and took once and a half the time stipulated, (R. 51, 56),—(and no soil was or was to be taken from the old levee, but petitioner was confined to the borrow pits for soil, Ptn. 12; R. 46, 52, 53),—proving that the soil must have been unfit,—the opposite of respondent's contention.

4. As to the claim (p. 8 of Rspdt's. Brf.) that,—

"The levees adjoining at both ends the one here * * * were completed within the contract time and without difficulty".

Evidence of this nature is incompetent in the Federal Courts and should not be considered,[1] and this is especially

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NOTE 1:

"* * * that as to the * * * question addressed to that witness and excluded, * * *, whether the cut was not constructed as cuts were ordinarily constructed * * *, the court did not err in its exclusion, * * * and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially similar to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead; * * *." (Union Pac. Co. v. O'Brien, 161 U. S. 451, 457.)

true here because even in State Courts which admit such evidence an exact similarity must be proved, and here dissimilarity was proved: New, the officer in charge, testifies that a difference of a foot or two in the height of the levee will determine whether or not it will slide, and that the two adjoining levees were of less height. (R. 52.)

5. As to the finding,—

> "Borings had been taken over the site of the proposed levee at intervals of 1,000 feet each to a depth of 25 feet, and a chart of these borings appeared on the contract map". (p. 4 of Rspdt's. Brf.)

Respondent proved that they were utterly inadequate.[2]

Moreover, respondent, previous to the work, approved petitioner's plan of operation and his machinery. (New, R. 52; Maxon, R. 46.)

Respondent's act in presenting the borings chart (Deft's. Ex. 16) was a representation that adequate borings had been taken, and, as they were utterly inadequate, this was a deception, entitling petitioner to rescind the contract (U. S. v. Atlantic Dredging Co., 253 U. S. 12); and

Respondent, previous to the work, approved petitioner's plant and plan of work (R. 46),—

NOTE 2:

"The original borings were taken on 73% of the project, every 1000 feet. There were 17 borings taken. They were each 2 inches in diameter, and represented an area of 54 square inches, and the pits were around 300 feet wide, and they were over 22,000 feet in length, and expressing it in percentages, it would give you one five-millionth of one per cent area, or the surface represented one five-millionth of a per cent of the borrow pit area. The field men are instructed to take borings at intervals of 5 feet, and when there is a change in the strata, to take a sample of that at every change." "The second set of borings were taken 200 to 400 feet apart during the work." (Rspdt's. witness, Heusman, R. 55.)

"which was assurance that the chart was correct and justification of reliance on it". *(Id.)*

6. As to the finding,—

"there was no evidence to show that the borings were inaccurately charted" (p. 5 Rspdt's. Brf.), "these borings were accurately charted and properly reflected the condition of the soil to be encountered" (p. 11 Rspdt's. Brf.); and

As to the contention that,—

"Only where the United States either represents itself as having knowledge which it does not possess or fails to convey information as to hidden conditions which it does possess is it held to warrant subsoil conditions". (Ps. 12, 13 Rspdt's. Brf.)

(a) *Respondent must have known the "totally unfit" condition of the soil.*

Inadequate as the borings were, none the less they must have revealed the cypress stumps, the wet condition of the soil and the foreign matter in it, and the Court below so stated,—

"Any sort of investigation * * * would have shown him that he would probably encounter wet soil; that it is not unusual to encounter cypress stumps; that water and such stumps are frequently found in that section, especially where there is an extra heavy growth of sugar cane, as in the instant case." (Bot. R. 41.)

Respondent urges that,—the presence of cypress trees "was a common occurrence" in the vicinity of the site "and to be expected". (Note 4, p. 10.)

New, respondent's officer in charge, knew that there would be cypress stumps. (Bot. R. 53.) He testified,—

"everyone expects to encounter some cypress stumps".

(b) *The chart both concealed and misrepresented the condition of the soil.*

Respondent's borings chart described the soil by names but stated as to its condition only that 10% was soft clay, and did not show that it was wet and filled with foreign matter and cypress stumps. (Deft's. Ex. 16. See also Klorer, p. 51.)

Clearly the one statement as to the condition of the soil that 10% was soft clay was an exclusion of any other defect or unfitness under the maxim "*expressio unius est exclusio alterius*", (17 C. J. S. §312, p. 730), and the failure to show the foreign matter, cypress stumps and sloughy wet condition was both a concealment and a misrepresentation. (Hollerbach v. U. S., 233 U. S. 165, 172.)

Respondent claims that Heusmann testified that the soil found was similar to that shown in the chart, but he did not testify that its unfit condition was shown in the chart,—the sole question involved. This witness also based his opinion on the fact that the chart showed 34% loam, but only 2 out of 142 inspection reports show any loam. (R. 55; Ptn. R. 13.)

Finally, respondent forecloses itself from its argument that

> "these borings were accurately charted and properly reflected the condition of the soil." (P. 11.)

By admitting, as it does, that petitioner was entitled to a finding that there were cypress stumps in the pits (Note 4, p. 10), and by proving, as it did, that the chart did not show the cypress stumps. (Deft's. Ex. 16; Klorer, R. 51.)

(c) This Court in a leading case foretold that contractors generally would suffer through inadequate borings just as petitioner here suffered through making the ruinously low bid of 12.40 cents per yard for work which respondent proved was worth 20 cents per yard. (R. 54, 56, 51, 48.)

> "Knowledge of the result of such investigations would protect the government, it might be, against an extravagant price based on conjecture of conditions, and enable contractors confidently to bid upon ascertained and assured data." (Christie v. U. S., 237 U. S. 234, 241.)

Although respondent may not have foreseen or planned it, the result of presentation of the chart made from the utterly inadequate borings, and the approval of petitioner's plan of work and his plant (R. 46), which

> "* * * was an assurance * * * of the truth of the representation, and a justification of reliance upon it", (U. S. v. Atlantic Dredging Co., *supra*),

resulted in petitioner's low bid of 12.40 cents on work which respondent proved was worth 20 cents a yard. These facts entitled petitioner to rescind. *(Id.)*

(d) Respondent's contention (p. 10, Note 4) that the presence of the cypress trees did not interfere with the successful conclusion of the work is in conflict both with the finding of the Court and uncontradicted and conclusive evidence.

(1) The proof on this question was, respondent proved that the work was worth 20 cents per yard instead of 12.40 (Ptn., Note 18, p. 6), which petitioner was induced to bid through the concealments and misrepresentations in the chart;

(2) Petitioner was delayed 30 to 40% because of the cypress trees (O'Mera, R. 44); and

(3) The Court found,—

> "Plaintiff ran into many difficulties in handling the soil from the borrow pits, encountering cypress stumps and other organic matter, which caused damage to his machinery. He also had difficulty with slough and slides." (R. 39.)

This Court emphasized in a leading case how important the failure to show the cypress trees,—(in that case logs),—was, saying,—

> "And how important it was to know the conditions is established by the finding that claimants were put to an expense of $6,150 over what would have been necessary 'if the borings sheets had represented the character of the ground with respect to logs'." (Christie v. U. S. *supra*, pp. 241, 242.)

(e) As respondent presented the borings chart showing that there was no defect in soil conditions except 10% soft clay (Deft's. Ex. 16), it is,—

> "a matter concerning which the Government might be presumed to speak with knowledge and authority." (Hollerbach v. U. S., 233 U. S. 165, 172.)

The Court continued,—

> "* * * this positive statement of the specifications" (here of the borings chart) "must be taken as true and binding upon the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such *mistaken representations.*" *(Id.)*

7. Respondent's contention (p. 12), that petitioner should have foreseen the unfit condition of the soil is in conflict with similar decisions of this Court, and in conflict as well with respondent's own contentions.

(a) This question arose under similar conditions in Christie v. U. S., *supra*,[1] where the conditions were similar to those here, but respondent's contention was on a far sounder basis than exists here, because in the case cited "they" (the contractors) "admitted," they had reason to and did expect to "encounter some logs," (while here petitioner was unfamiliar with the site and the locality, R. 31) yet the Court overruled the contention and held that the contractors had the right to rely upon the borings chart. The same principle was established in Hollerbach v. U. S., *supra*, and in U. S. v. Spearin, 248 U. S. 135, and in spite of a contract provision requiring the contractors to examine the site. There is no such provision in this contract.

8. As to the finding that,—

> "the petitioner had no experience in building levees" (R. 31),—

this is true, and respondent was bound to take this into account in all the steps leading up to the contract,—particularly in presenting the borings chart, and in approving petitioner's work plan and his equipment. During the entire period of work, however, he had competent and experienced superintendents,—men qualified to deal as well as could be with the "totally unfit" soil available (R. 43, 45, 46, 50); and New testified that McWilliams, petitioner's superintendent, "is an old levee builder * * * and a very good one." (R. 54.)

NOTE 1:

"The contentions are attempted to be supported by the alluvial character of the river, as we have said, its tortuosity, its fluctuations between high and low water in winter and summer, and that for twenty years the United States had operated snag boats for the removal of stumps and sunken logs from the channel of the river. But inferences from such facts could only be general and indefinite, and were not considered by the government as superseding the necessity of special investigations and special report. It assumed both were necessary for its own purpose and subsequently would be to those whom it invited to deal with it."

9. As to the finding that respondent served a large number of notices, claiming that petitioner did not do the work properly in specified particulars (ps. 5, 9 of Rspdt's. Brf.), and respondent's contention that petitioner was not entitle to a finding that the soil was wet and sloughy because,—(1) this condition resulted from petitioner's faulty methods; (2) rain and seepage were common occurrences; (3) it was petitioner's duty to so handle the soil as to reduce sloughing to a minimum; (4) other contractors completed the work with this soil; and (5) experts swore that the work could be completed with the soil. (*Id.* p. 9.)

Respondent's officer in charge swears that petitioner's superintendent McWilliams was a very good levee builder (R. 54), yet he became superintendent in July, 1932 (R. 48, 50). In the 8 months of work up to then only 51 violation notices were given, 24 of which were duplicates, and 11 of which stated that the soil was wet or showed a tendency to slough (Deft's. Ex. 15), and for the next 5 months 13 of the 16 slides occurred (Deft's. Ex. 16), and McWilliams was given 180 notices. (Deft's. Ex. 15.) Over three times more notices were given in the 5 months McWilliams was superintendent than in the preceding 8 months, and 13 slides occurred in the 5 months as against 3 in 8 months. (Deft's. Exs. 15, 16.)

So, respondent's flattering endorsement of McWilliams, and these comparative records constitute an admission by respondent that there was no faulty work during his superintendency, and that there could not have been any during the far more efficient preceding superintendency, and that the troubles with the work arose from the soil being "totally unfit" and not from bad work.

McWilliams was a very good levee builder and on this record his predecessor must have been far better.

Still again, there is really no issue here as to bad work: Petitioner placed 1,550,822 cubic yards which became part of the levee. (Ptn. p. 6, Note 17). Even if he had somewhat increased the difficulties arising from the "totally unfit" soil, (and he did not) that was his loss and did not effect respondent.

Respondent put in evidence Exs. 52 A-B-C-D, its report of daily progress of the work, showing weather, soil conditions, delays, "*any events of importance for each day*", and "remarks",— a complete record, made on the job, and binding on respondent. (Snell Isle Inc. v. Comr. Int. Rev. 90 F. (2d) 481, 482; Landay v. U. S. 108 F. (2d) 698, 704).

They do not charge petitioner with the violations claimed in the violation notices. (R. 32-34; Respondent's Brf. pp. 5, 9.) They mention only and in but a few instances insufficient drainage caused by seepage or heavy rains, or breakdown of a machine, proving, (as do the notices also Deft's. Ex. 15) any violations must have been corrected before the Report was made, or that they never occurred.

The Daily Reports show that drainage was maintained as far as possible, and that pumps were operated day and night. The witnesses also testified that,— petitioner placed no soil on the levee during rains; water was not permitted to remain between fills (R. 44, 45, 46, 47, 48, 49); adequate provisions were made for drainage; it was impossible to get the water out of the ground. (R. 46, 47, 48.)

So, from respondent's endorsement of McWilliams as a very good levee builder (R. 54); from the failure of its Daily Reports to charge petitioner with faulty work; and from the proof by the Daily Reports and by the witnesses that the petitioner did drain the levee well, it clearly appears that the bad condition in the levee did not result from faulty work.

Next, the evidence shows conclusively that this bad condition existed in the borrow pits, and that this condition of the soil inevitably continued after its being placed in the levee:

The fact that the soil in the borrow pits was wet, sloughy, filled with foreign matter and with cypress trees, is fully shown under "2." hereinabove and in Note 6, p. 4 of the Petition, and here we will say only,—

Of respondent's 142 Daily Reports, which it put in evidence, 100 show that the soil was wet, very wet, and sloughy (see Appendix), and this alone is conclusive evidence. Not one Report shows the soil to be dry.

10. As to the contention that,—

> "The evidentiary facts found by the Court below are not inconsistent with its ultimate findings in respect to the character of the earth". (p. 9 of Rspdt's. Brf.)

this matter is fully covered in the Petition, ps. 10 to 13 incl.

That there was no basis for the finding that the soil was "satisfactory", but that it is in conflict with respondent's own conclusive proof and with the evidence as a whole, is fully shown under "2." and "9." hereinabove.

11. As to respondent's contention (pp. 10, 11) that the provisions of Article 7 of the contract (R. 24) and Section 22 a of the Specifications (R. 17, 18) that the soil used must be "of the best grade, clean earth, free from all foreign matter, which would not slough or show a tendency to slough" are obligations * * * upon the contractor whose duty it was to select from the material at hand, which the United States undertook to furnish, suitable material, as the Court below found (R. 37); that there was suitable material available * * *; and that the failure of the petitioner to select that material, not the failure of the United States to provide such material, caused petitioner's loss. (pp. 10, 11 of Rspdt's. Brf.)

(a) *There was no "suitable" soil in the borrow pits which petitioner could have selected.*

The "totally unfit" condition of the soil is fully shown under Note 6, p. 4 of the petitioner, and under "2." and "9." hereinabove.

In addition, it will be found that neither the Daily Reports (see Appendix, *infra*), nor any of the 231 notices served (Deft's. Ex. 15); nor any witness described the soil as "suitable" or "fit", much less as "of the best grade".

Nor does any one of these papers in the case or any witness testify that the soil was partly good and partly bad, so that petitioner might have "selected" fit material.

All of the papers and all of the witnesses describe the soil as being uniformly unfit,—unfit throughout,—all of it unfit.

The contention (p. 11) that petitioner might have selected "satisfactory" soil appears for the first time in the findings and opinion of the Court. (R. 40, 41.) No witness testified that such a selection could be made nor does any paper in evidence support this contention. All of the evidence verbal and written is to the contrary.

Heusmann, the one witness who used the word "satisfactory", said that the material used and available was "satisfactory", (R. 55) which means all of it, which is in direct contradiction of the Daily Reports, (conclusive evidence) (Appendix, *infra*), of the notices (R. 32), of the answer (R. 10) and of the testimony of all other witnesses. (R. 43-56.)

There is no evidence whatever that there was any "suitable" or "fit" soil, and only the testimony of Heusmann that it was "satisfactory" where he admitted his statement was "without reference to the length of time" for completion, and provided that there was 34% of loam, as shown by the chart, and there was practically no loam. (R. 55.)

The contention that there was enough "satisfactory" soil which petitioner could have selected (Rspdt's. Brf. p. 11) is in conflict with the position taken by Respondent throughout the work, in its answer, and throughout the trial (Ptn. Note 21, p. 6).

If there was plenty of "satisfactory" soil for petitioner to select, then the second set of borings (R. 55) would have been wholly unnecessary.

(b) *The provisions of Article 7 and Section 22-a* (R. 24, 17, 18) *were obligations of Respondent,—not of petitioner.*

(1) Respondent agreed to furnish the soil. (R. 16.) If Respondent were correct in its contention that petitioner was bound to select fit soil from the pits, he could select it only in case it was there, and it appears conclusively from (a) last above, and from "2." and "9." above, and from Note 6, p. 4, and Note 21, p. 6 of the Petition that there was no such soil in the pits.

So, petitioner could well be excused from performance because it was impossible.

(2) The doctrine is established by this Court that ordinarily the one who is to be supplied with an article by another is not obliged to pick it out of a mass, and while that may be limited by petitioner being liable to select good material if it existed separate and apart from the unfit material, the general doctrine seems applicable here because New, the officer in charge, swears that the cypress trees extended throughout the entire length of the pits (R. 55), and the fact that pumps had to be used on the pits as a whole, (Deft's. Ex. 52 A-D), shows that the wet, sloughy condition must have prevailed throughout the pits, and the Daily Reports (*Id.*) show conclusively that all the material was wet and sloughy.

The doctrine that a buyer is not obliged to select was laid down in the case of goods where selection would have been easy, and should apply much more here where the finding of any fit earth below the surface would have been a hopeless and endless excavation task.

> "The seller * * * has no right * * * to require him" (the buyer) "to select part out of a greater quantity." (Norrington v. Wright, 29 L. Ed. 366, 369).

(c) *That securing best grade soil was an obligation of petitioner is not supported by the decisions, but is in conflict therewith.*

Respondent cites no authority for this contention (p. 11), but simply states that the obligation is that of petitioner.

This Court laid down the principle at stake in Philadelphia Etc. R. R. Co. v. Howard, 13 How. 307, where it was held that where a contract stated that the contractor was to place earth "where ordered by the engineer", the owner was bound to provide a place, and, of course, a reasonably convenient place as well as seasonably to give the order.

The precise question at issue here was involved in McPherson v. San Joaquin County, 124 Cal. xvii, 56 P. 802, where it was held that the contention that where the contract provides that "all * * * materials * * * used * * * shall be of the best quality and suitable", the contention that it was the contractor's duty to use any material furnished, and if it happened to be wholly unsuitable, it was still his duty to use it, was held to be "neither sound in law nor in morals".[1]

As Respondent agreed to furnish the soil, (R. 16), the provision that it should be of the "Best Grade" (R. 24)

NOTE 1:

"When defendant undertook to furnish casing it agreed to furnish casing suitable for the purpose. But in the specifications is a clause which, fairly construed, we think, in terms put upon defendant the duty to furnish suitable casing. It reads: 'The bidder to whom the contract may be let will be required to enter into an agreement * * * to furnish and erect machinery and plant of the most approved kind, and all tools and materials of every description used in the prosecution of the work shall be of the best quality * * *. * * *.' Respondent contends that it was plaintiff's duty to use any casing furnished, and, if it happened to be worthless and wholly unsuitable, it was still his duty to use it, and take the consequences, to which the maxim '*Damnum absque injuria*' applies. This contention is neither sound in law nor in morals." (McPherson v. San Joaquin County, 124 Cal. xvii.)

was clearly both a representation to the contractors that such soil would be available, and an agreement that Respondent would furnish it. It is to be construed in connection with the borings chart, which showed that there was no unfitness in the soil except that 10% was soft clay (Deft's. Ex. 16), and the approval of petitioner's plan of work and plant (R. 46), "which was assurance that the chart was correct and justification of reliance on it". Construing all these matters together, as they should be construed, the provision that "Best Grade" soil only should be used was both a representation that sufficient soil of that kind was available, and an agreement to furnish it. (Hollerbach v. U. S. *supra.*)

The importance of an interpretation of these provisions of the contract cannot be overstated: They are in the standard form of Government contracts and until a controlling construction is made by this Court contractors, who rely on the provisions, (as many will), will be led to make extremely low bids, and wherever the soil proves unfit, as here, they will be met with the contention made here that it was their duty to make the unfit soil fit and to find and select satisfactory soil. So, the question will continue to be of widespread interest until it is settled, and will inevitably result in great injustice and unfairness.

Equally, even where there is "Best Grade" soil contractors will be afraid to rely on these provisions and will disregard them, and make unjustifiably high bids, which will be unfair to the Government.

It will be seen by reading the extract in the Note above of the case cited that the provision in that case was contained in a statement of the obligations of the contractor,

and the case at bar is far more favorable to the petitioner because the provisions that "Best Grade" soil only shall be used are such only, and are not contained in a statement of petitioner's obligations.

12. The following issues argued by petitioner in the petition are none of them answered by Respondent, each of which petitioner deems a controlling issue for granting certiorari, viz,—

(a) Respondent failed and refused to pay petitioner money it conceded to be due him, and which it had no right to hold (ps. 16, 17 Ptn.).

(b) Petitioner had many good grounds for rescinding and it rescinded, and Respondent served written objections thereto, but none of them were valid, whereby rescission became effective ((12) p. 17 Ptn.).

(c) Respondent proved that there were cypress trees throughout the entire length of the borrow pits (Bot. R. 53), which made it necessary to dig deeper or go out farther for the material (Top R. 54), which involved the loss of 30 to 40% of time (R. 44), and required a large amount of additional machinery,—about a dozen machines instead of three as provided in the plan approved, (R. 35, 36; Plf's. Ex. 28, and Deft's. Exs. 52 A-D and Ex. 18), yet Respondent refused to pay the increased cost, but required petitioner to continue on the contract terms (R. 11; (10) Ptn. p. 16).

(d) Petitioner urged, (Ptn. ps. 17, 18, 19), that Respondent was not entitled to recover on its counterclaim for the reasons therein shown, particularly that the agree-

ment to furnish "Best Grade" soil, and an implied warranty that the soil furnished would be fit, were both conditions precedent, and neither of them was performed.

(Note: Respondent does not question petitioner's computation of the amount due as being $313,060.17. (Ptn. p. 17.)

13. As to the finding that respondent demanded that petitioner furnish additional equipment because progress was unsatisfactory, (p. 6, Rspdt's. Brf.) and that petitioner had completed about 45% of the work in 91% of the contract time, *(Id.* pp. 5, 6), petitioner when he encountered the cypress trees was compelled to dig deeper or go out further for material, (New, R. 54), and was delayed by the cypress trees 30 to 40% (O'Mera, R. 44), and respondent proved that petitioner lost most of 160 days and parts of every other day through the bad condition of the soil. (Deft's. Ex. 52 A-D.)

14. As to the finding that,—

> "at no time did petitioner appeal from the decision of the contracting officer to the Secretary of War" (R. 36),—

petitioner protested repeatedly during the progress of the work, and also in the notice of rescission that sub-surface conditions differed materially from those represented by the chart and in the contract and specifications (R. 45, 48, 49), and the Government, as the result thereof and of slides, found it necessary to and did make adequate borings, soil analysis and stability computations to determine whether the soil available was such that it was physically possible to construct the levee with it (R. 52), but, although thus fully advised that the soil differed materially from what was represented, the contracting officer never made the

changes in the drawings and/or specifications, and never adjusted or offered to adjust the increased cost as provided by Articles 3 and 4 of the specifications.

Nor did the contracting officer decide the question of fact arising under the contract as to there being a material difference in sub-surface conditions from those shown on the drawings or indicated in the specifications (R. 45, 48, 49, 10), so that no appeal was possible,—there was nothing from which to appeal.

15. As to the finding that

> "On December 12, 1932, petitioner * * * advised the contracting officer that it elected to rescind the contract, contending that subsurface or latent conditions * * * differed materially from those represented in the plans and specifications (R. 36),"

petitioner stated in his notice,—

> "if mutual satisfactory adjustments can be made, I am willing to proceed with the work and to that end I hold myself in readiness to discuss this matter with you * * *." (R. 36.)

The contracting officer replied, December 14, 1932, that petitioner's notice did not show how the conditions differed, and he requested such information, signed by two persons who had no interest, saying in conclusion "you are expected to proceed with the work called for under the terms of the contract." (R. 10, 11.)

Petitioner offered, December 16, 1932, to discuss the question. (Deft's. Ex. 13.)

January 3, 1933, the contracting officer advised petitioner that, owing to the failure to so prosecute the work as to

complete it within the contract time, the right to proceed was terminated. (R. 12.)

(11) As to the finding of the Court of Claims that plaintiff could have satisfactorily completed the work in the agreed time with the available material (R. 37),—this finding is in direct and complete conflict with respondent's own record, showing that petitioner lost 160 days, and parts of every day through the bad condition of the soil, (Deft's. Ex. 52 A-D), and that completion on time was impossible. *(Id.)*

The Court below also found that defendant was negligent in handling material when wet, and impounding water in partial fills (R. 37), but all the material was wet *(Id.)*, and such quantities of water ran out of the soil that it necessarily accumulated between fills, ((i), Ptn. Note 6, p. 4).

(12) Respondent proved that placing the material was worth 20 cents per cubic yard, (New, R. 54; Finn, R. 56; Dee, R. 48; McWilliams, R. 51; Note 18 Ptn.).

Conclusion.

It is respectfully urged that certiorari should be granted for the reasons urged in the Petition and hereinabove.

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APPENDIX.

Abstract of Government Inspector's weekly report for each day's work, and the climate and soil conditions at Lots A, B, C and D (Def's. Ex. 52-A-B-C-D).

1931

Lot A

Nov. 5-10: Assembling equipment.

Nov. 11-15: 18 men working.

Nov. 16-20: Started excavating in borrow pit, and placing material in spoil bank; material buckshot. *Rain 17, 19, 20th.*

Nov. 21-25: Material wet from recent rains. Rain 21, 25.

Nov. 26-30: *Rain 27th not enough to affect material seriously.*

Dec. 1-5: *3 ten-hour shifts lost due to material being too wet from rains; closed on 5th due to material being too wet. Rain 1, 2, 3rd.*

Dec. 6-10: Material buckshot; *too wet to use machines during 5 days.* Rain 6, 7, 8th.

Dec. 11-15: *Due to heavy rains material too wet for work* until 15th. Rain 13th.

Dec. 16-20: Machine worked only two days due to rains and *material being too wet to handle;* material buckshot. Rain 16, 17, 18, 19th.

Dec. 20-25: No work due to *material being too wet to handle.* Rain 24th.

Dec. 26-30: Time spent in clearing and opening drains, and in *draining borrow pits where water is being pumped out. Rain 30th.*

1932

Jan. 1-5: *Water in borrow pits.* Rain 4, 5th.

Jan. 6-10: *Water in borrow pits* being pumped out.

Jan. 11-15: Machine operated 2 days but *discontinued because of weather conditions. Rain 11, 12th.*

Jan. 16-20: *Machine resumed work on 20th.*

Jan. 21-25: Machine *discontinued on 22nd because of weather conditions, and material being too wet to work.* Rain 22, 23, 25th.

Jan. 26-31: *Material too wet to work.* Rain 26, 29, 30th.

Feb. 1-5: *Pits are being pumped continuously.*

Feb. 6-10: Started placing material in embankment.

Feb. 11-15: Contractor has two pumps, one *pumping out muck ditch, other borrow pit continuously;* material clay, loam and buckshot, moist. Rain 13th.

Feb. 16-20: Material moist sand, clay and buckshot; base moist. Rain 19th.

(Note: The daily reports from Feb. 21st to March 6th are missing, but Defendant's Ex. 18 shows the days it rained during that time.)

Feb. 21-25: *Too wet to use B and C machines; used A machine part of 22nd; Rain 22, 23, 24th.*

Feb. 26-27: *Too wet to use C machine on 26th and B on 26 and 27th.*

Mar. 5: *Rain, no work with machines.*

Mar. 6-10: *B, C, and D machines idle on 6th and 7th due to rains; B machine could not operate on account of base being saturated with seepage water,—expect it will be 7 or 8 days before it can start up;* material clay, sand, buckshot.

Mar. 11-15: *B machine shut down for 4 weeks; rain and seep water made it impossible to use it;* material wet sand, clay.

Mar. 16-20: *B idle on account seepage; C bogged down on 16th; material wet* sand and clay.

Mar. 21-25: Material moist sand and clay; Rain 21st.

Mar. 26-31: Material sandy-clay. Rain 27, 30, 31st.

Apr. 1-5: Material moist sandy, clay and buckshot.

Apr. 6-10: *Seepage coming into borrow pits, contractor pumping pits, but material awful wet;* taking wet material 1000 feet below spoil bank and placing it into levee before it has time to dry.

Apr. 11-20: Material sand, clay and buckshot, moist; subsidence, so borings are being made.

April 21-25, LOT A: *Heavy rains of 24th, 25th flooded the the work; contractor pumping and draining off water: material wet* clay, sand, buckshot.

LOT B: (April 23-25): Started excavating; report about same as above.

April 26-30, LOT A: *Rain flooded the work;* material same as above. Rain 28, 29th.

LOT B: Machines idle due to rains, *too wet.* Rain 28, 29th.

May 1-15, LOT A: Material same: slides being cut out.

LOT B: Machines working on ditches. Moved to Lot A.

May 16-20, LOT A: *Heavy rains have the machines and work shut down.* Rain 16, 17, 19, 20th.

LOT B: Moved on 15th to Lot A.

May 21-25, LOT A: *Rain prevent work; it will be several days before he can resume operations.* Rain 21, 22, 23, 24, 25th.

May 26-30, LOT A: Working on ditches; material clay, sand, buckshot. Rain 26th.

June 1-30, LOT A: Material same as above. Rain 7, 10, 13, 14, 25, 28.

LOT B: Resumed work on 10th; *Rain 13, 14th;* material same as above.

July 1-5, LOT A: Cutting slides. Rain 1, 2, 3, 4, 5th.

LOT B: Rain 1, 2, 3, 4, 5.

July 6-10, LOT A: Contractor *moved his equipment to Lot B and expects to keep it there until Lot A dries out.* Rain 9th.

LOT B: *Material taken from borrow pit, awful wet.* Rain 9th.

July 11-15, LOT A: *Material* sand clay, buckshot, *wet.*

LOT B: Report same as above. Rain 13th.

July 16-20, LOT A: *Material same* as above. Rain 16, 17, 18, 19, 20.

LOT B: Material sand and buckshot; *Rains of last few days retarded progress of the work.* Rain 16, 17, 18, 19, 20.

July 21-25, LOT A: *Material* sand, clay, buckshot, *wet.* Rain 21st.

LOT B: *"the heavy rains of Thursday did not do any damage to the work and the water drained off very quickly. The material is getting better and does not contain as much water as it did."* Rain 21st.

July 26-31, LOT A: *Material* sand, clay, buckshot, *wet.* Rain 26, 29.

LOT B: *Material* sand, clay, buckshot, *wet.* Rain 26, 29.

LOT D: Started on pits; *material wet* sand and clay. Rain 26, 29th.

Aug. 1-5, LOT A: *Material wet* sand and buckshot. Rain 1, 3, 5th.

LOT B: *Material wet* sand, buckshot, and clay. Rain 1, 3, 5th.

LOT D: *Material wet* sandy-clay; machine G spent 5 days building ditches; *the rains have not done any damage to the work.* Rain 1, 3, 5th.

Aug. 6-10, LOT A: *The rains of last few days has flooded the work and compelled the contractor to shut down.* Rain 6, 8, 9, 10th.

LOT B: Report same as above, and *rains "did considerable damage to the work";* material sand, buckshot. Rain 6, 8, 9, 10th.

LOT C: Rain *6, 8, 9, 10th.*

LOT D: Rain. The rains of last few days have not done any great damage to the work, because *the material was wet before these rains.* Rain 6, 8, 9, 10th.

Aug. 11-15, LOT A: *Had to shut down machines these 5 days on account of rain of the last few days.* Rain 11, 12, 13th.

LOT B: *No work on levee on account of rain,* 11, 12, 13th.

LOT C: *No work on account rain;* moved to Lot B. Rain 11, 12, 13th.

LOT D: The rains did not do much damage to work because *the material was wet before the rains.* Rain 11, 13th.

Aug. 16-20, LOT A: Material sand and buckshot; (moved to Lot B). Rain 17th.

LOT B: *Rain 17th.*

LOT D: *Material wet* sandy-clay. Rain 17th.

Aug. 21-25, LOT B: Material sand, buckshot: *rain retarded progress of the work.* Rain 21, 22, 23, 25th.

LOT D: *Rains retarded progress of work.* Rain 21, 22, 23, 25th.

Aug. 26-31, LOT B: *Rain 27th; material wet,* sand, buckshot. Rain 27th.

LOT D: *Rain 27th; material wet* sandy-clay. Rain 27th.

Sept. 1-5, LOT B: *Rain 1st; material wet* sand, buckshot. Rain 1st.

LOT D: *Rain 1st; material wet* sandy-clay. Rain 1st.

Sept. 6-10, LOT B: Material moist sandy-clay, buckshot.

LOT D: Material moist sandy-clay.

Sept. 11-15, LOT A: Material sand, buckshot; cutting out slides. Rain 12th.

LOT B: Material sandy-clay, buckshot. Rain 12th.

LOT D: Material sandy-clay. Rain 12th.

Sept. 16-20, LOT A: Material sand, buckshot, cutting out slides. Rain 18, 19th.

LOT B: Material wet sandy-clay, buckshot; *"The heavy rain of yesterday retarded progress of the work."* Rain 18, 19th.

LOT D: *"The heavy rains flooded the work and the contractor had to shut all machines down."*

Sept. 21-25, LOT A: Cutting out slides.

LOT B: Material moist, sandy-clay, buckshot.

LOT D: Material moist, sandy-clay.

Sept. 26-30, LOT A: Cutting out slides. Rain 27th.

LOT B: Material moist, sandy-clay, buckshot.

LOT C: Material sandy-clay. Rain 27th.

LOT D: *Material wet,* sandy-clay. Rain 27th.

Oct. 1-5, LOT A: Cutting out slides. Rain 2, 3, 4th.

LOT B: Material sandy-clay, buckshot; *"The rains of past few days retarded progress of the work."* Rain 2, 3, 4th.

LOT C: Material sandy-loam; *shut down on 3rd and 4th on account of rain, and 5th because it was too wet.* Rain 2, 3, 4th.

LOT D: *The rains of the last few days and machine undergoing repair has retarded progress of the work.* Rain 2, 3, 4th.

Oct. 6-10, LOT A: Cutting out slides.

LOT B: Material sandy-clay, buckshot.

LOT C: Material moist sandy-clay.

LOT D: Material sandy-clay, buckshot.

Oct. 11-15, LOT A: *The heavy rains flooded the works;* completed cutting out slides. Rain 15th.

LOT B: *Heavy rains of today and last night compelled the contractor to shut down machines.* Rain 15th.

LOT C: Report about the same as above. Rain 15th.

LOT D: Report about the same as above; material sandy-clay, buckshot. Rain 15th.

Oct. 16-20, LOT A: Cutting drainage ditches; building runs across borrow pit to haul in material to complete levee. Rain 16th.

LOT B: *Material wet* sandy-clay, buckshot; *"The rains of last Saturday and Sunday greatly retarded the progress of the work."* Rain 16th.

LOT C: *No work 16, 17, 18th on account of rain, too wet.* Rain 16th.

LOT D: *"The contractor did not make very much progress these 5 days owing to the heavy rains of last Sunday and Saturday."* Rain 16th.

Oct. 21-25, LOT A: Material moist, sand and buckshot. Rain 25th.

LOT B: Material moist sandy-clay, buckshot. Moved to Lot A. Rain 25th.

LOT C: *Material wet.* Rain 25th.

LOT D: *Material wet* sandy-clay, buckshot. Rain 25th.

Oct. 26-31, LOT A: *The heavy rain flooded the work, and forced the machines to shut down;* material sand and buckshot. Rain 26, 31st.

LOT C: *The contractor made very poor progress owing to heavy rains of last week.* Rain 26, 31st.

LOT D: *Material wet* sandy-clay, and buckshot. Rain 26, 31st.

Nov. 1-5, LOT A: *Heavy rain of 31st retarded progress of the work; material wet.*

LOT C: *Contractor is trying to cut drain ditches to let out water which accumulated from the heavy rains; material wet,* sandy-clay.

LOT D: *Material wet,* sandy-clay, buckshot.

Nov. 6-15, LOT A: Material moist.

LOT C: Material moist.

LOT D: *Material wet.*

Nov. 16-20, LOT A: *Rain 17th, prevented "D" machine from working 18-20.*

LOT B: Material sandy-clay, buckshot. Rain 17th.

LOT C: *Material wet; idle 18, 19th on account heavy rains.* Rain 17th.

LOT D: *Idle on account of rain,* 17th, 18th.

Nov. 21-25, LOT A: *"D" machine idle 3 days as it was too wet;* no material placed in levee; *rain made it impossible to work tractors for several days. Material wet,* sand, and buckshot. Rain 24, 25th.

LOT B: *Material wet* sandy clay, buckshot. Rain 24, 25th.

LOT C: *Outfit idle, too wet. Material wet* sandy-clay.

LOT D: *The heavy rain yesterday flooded the work it will be several days before work can be resumed.*

Nov. 26-30, LOT A: Material sandy clay, buckshot. *Outfit idle, too wet;* moved to Lot B.

LOT B: *Outfit idle, too wet.*

LOT C: *Outfit idle, too wet; material wet* sandy-clay.

LOT D: *Outfit idle, too wet; material wet* sandy-clay, buckshot.

Dec. 1-5, LOT B: Material sandy-clay, buckshot. Rain 4th.

LOT C: Material moist sandy-clay. Rain 4th.

LOT D: *Material wet* sandy-clay, buckshot.

Dec. 6-12, LOTS B, C, D: Rain; outfit idle too wet. Rain 6, 7, 8, 9, 10th.

(26)

No. 463.

IN THE

Supreme Court of the United States

October Term, 1942.

ALEX RANIERI,
PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Citations

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ALEX RANIERI,
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vs.
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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition for Rehearing.

Comes now the above named petitioner, Alex Ranieri, and presents this his petition for a rehearing, and, with leave of the Court, his reply brief filed herewith and made a part hereof, on his application for a writ of certiorari to review the judgment of the Court of Claims in the above entitled cause. Petitioner's application for such writ was denied on December 14, 1942.

Grounds for Rehearing.

1. This petition for a rehearing is filed under Rule 33 of this Court.

2. *Petitioner asks a rehearing because the Court did not have before it when considering the Petition an Abstract of the Daily Reports, which are the conclusive evidence on the issues, but too voluminous for examination by the Court. The Abstract was submitted below and its correctness unchallenged. An examination of it is essential to a correct or even an intelligent decision. It is annexed to the Reply Brief which was prepared and printed within a week of the filing of Respondent's brief, and is filed herewith.*

Defendant put in evidence *Exhibit 52 A-D,* its weekly written *Report* of each day's work, embracing a description of the soil, the reasons for the contractor's outfit being idle, remarks, and "any events of importance for each day". These reports are conclusive evidence on all the many matters connected with the progress of the work (Reply Brf. p. 13). By stipulation, this voluminous Exhibit was not printed but was made a part of the Record herein (R. 56-58), and has not been examined by the Court.

This whole case revolves about the condition of the soil:

Respondent agreed to furnish the soil (R. 16; Ptn. p. 3), and thereby became subject to an implied warranty to furnish fit soil (*infra* p. 10, Note 2), (in addition to its agreement hereinafter described,—that the soil "should be free of all foreign matter, with no tendency to slough and of the best grade", hereinafter called "*Best Grade*", *Id.*) If it failed to furnish fit soil, it became liable for the damages suffered, and these *Reports* are of superlative importance because Respondent thereby proved beyond dispute that it utterly failed to furnish fit soil, as an examination of the abstract of these *Reports* will show.

The *Reports* prove, (besides other harmful results), that, *through the unfit condition of the soil,* petitioner lost the most of 160 days, (half the time he worked), and parts of every day.

Yet the Court below found that this soil was "Satisfactory". While these Reports are conclusive and cannot be contradicted, Respondent attempted this on the testimony of witnesses, but they not only agree with the Reports that the soil was unfit but show that it was pervaded with cypress stumps and foreign matter, making the work more difficult and taking more time (Reply Brf. ps. 2-5). The conclusion is also in conflict with the Court's own evidentiary findings, and with 107 notices that the soil was unfit served by Respondent on petitioner. (*Id.*)

Next the Court below, ignoring petitioner's loss of half his time through the unfit condition of the soil, found what plainly was impossible,—that but for his own fault petitioner could have completed in time, (R. 37).

These Reports conclusively show that the Court erred in its findings and refusal to find, as stated in the Petition and Reply Brief and herein.

3. The decision below is not alone in conflict with the landmark decisions of this Court, but even more important with the general intent of Congress to set up jurisdiction in the Court of Claims and this Court which would insure the payment of just claims against the Government, and specifically that this should be accomplished through a fair trial in a Court established for that purpose. Here, petitioner was led to bid 12.40 cents per cu. yd. for work, the fair value of which was 20 cents (as Respondent proved Pt'n. p. 6, note 18), through Respondents misrepresentations and concealments, resulting in Petitioner's ruin, and

he was then led into a litigation which has lasted eight years, with the following unjustifiable results,—

The Court below,—

(a) Refused to make findings of controlling facts entitling petitioner to recover, based on Respondent's conclusive evidence, (Pt'n. pp. 12-17) and

(b) Made findings also on controlling questions both without any evidence and in conflict with Respondent's conclusive evidence, (Pt'n. p. 12; Reply Brf. pp. 2-23), and

(c) Made ultimate findings in conflict with its evidentiary findings (Pt'n. pp. 10-12, 15-17).

(d) In addition, the construction of a vital provision of the Government standard form of construction contract was involved, delay in construing which will be disastrous to contractors and harmful to the Government.

4. The following issues raised by petitioner are not answered by Respondent,—[1].

NOTE 1.

Respondent refused to pay petitioner money due which it had no right to hold and of which petitioner was in dire need (Ptn. 16, 17); petitioner had valid grounds to rescind and rescinded, and Respondent served written objections, none of them valid, whereby recission became effective (*Id.* p. 17); Respondent proved that there were cypress trees the entire length of the pits (*Id.* p. 4, note 6; R. 53, 55, 56), necessitating going further out or digging deeper for material (Ptn. p. 5, note 12), involving 30 to 40% loss of time (*Id.* note 11), and requiring about a dozen machines instead of the three approved previous to the work (Def's. Exs. 52 A-D, and 18; R. 36; Ptn. p. 5, notes 9, 13), yet Respondent refused to pay the increased cost (Ptn. p. 16, R. 11); that,—

Respondent is estopped through having claimed through the progress of the work (Def's. Ex. 52 A-D), and in its answer that the soil was "totally unfit" (R. 10) from now claiming (with no evidence and in conflict with its Daily Reports, and the 107 notices it gave petitioner), that there was "satisfactory" soil, (a word of most uncertain meaning, but Respondent clearly recognized that the evidence prohibited use of the customary word,—"fit"), and from adopting the alleged duty to "select" it, never discovered by Respondent until after the decision below, (Ptn. p. 6, note 21, and p. 15); and that,—

Respondent is not entitled to its counterclaim as the agreement to furnish "Best Grade" soil, (*Id.* p. 3, notes 2, 3 and 4), and the implied warranty that the soil would be fit, were both conditions precedent and neither was performed by Respondent, (Ptn. ps. 14, 17-19).

5. Respondent presented Petitioner a soil chart which it proved was made from borings which were utterly inadequate, (Reply Brf. ps. 6, 7). It also approved petitioner's plant and plan of work, which was sufficient to handle fit soil and much more "Best Grade" soil, (but not the sloughy soil pervaded with cypress trees and foreign matter encountered), which

> "* * * was an assurance * * * to the company" (petitioner) "of the truth of the representation, and a justification of reliance upon it" (U. S. v. Atlantic Dredging Co., 253 U. S. 1, 11, 12.

This was a deception entitling petitioner to rescind, (*Id*), yet, (although because of slides, adequate new borings, soil analysis, and stabilization computations became necessary to determine whether, the levee could be built with the available material), (R. 52) the Court refused to find these facts, Respondent makes no defense of its presenting inadequate borings and this Court holds that this alone was a deception, (intensified by approval of petitioner's plant and plan of work) entitling petitioner to rescind. (U. S. v. Atlantic Dredging Co., 253 U. S. 1, 11, 12).

The borings chart showed that the only defect in the condition of the soil was that 10% was soft clay, but Respondent's conclusive proof was that the soil was all wet and sloughy (Def's. Ex. 52 A-D; Appendix Reply Brf.) permeated with "cypress stumps and other organic matter, (R. 55, 56, 53) which caused damage to his" (petitioner's) "machinery", and "he" (petitioner) "also had difficulty with sloughs and slides", (Opinion, R. 39), yet the Court found that the borings were not inaccurately charted (R. 32), and that Respondent's officers did not misrepresent conditions (R. 37).

The inadequate borings and approval of the plan of work and machinery, and concealments and misrepresentations in the chart, induced petitioner to bid 12.40 cents per cubic yard for the work which Respondent proved was worth 20 cents (Pt'n. p. 6, Note 18).

Respondent contends, on the testimony of one expert witness, (in conflict with its own documentary evidence, the borings chart, and the Daily Reports, and therefore incompetent) that the soil was "satisfactory". This testimony is examined in the Reply Brief, (ps. 2-5). All of the witnesses cited, including Respondent's officer in charge, testified that the soil was "unfit". Respondent's claims that showing the names of the soil was sufficient without stating their condition, but this Court held that describing soil as sand and gravel without stating that they were cemented together entitled the contractors to recover the extra expense of excavating (Christie v. U. S., 237 U. S. 234).

Respondent admits that there should have been a finding, (as the Court below did find, in its opinion, R. 39), that there were cypress trees (Rspds. Brf. p. 10). That they impeded the machinery and greatly slowed down the work, 30 to 40% is undisputed (R. 44). They were not shown in the chart (Def's. Ex. 16).

Heusmann, Respondent's expert, says that the organic content must have been high (R. 56). The misrepresentations and concealments in the borings chart entitled petitioner to rescind and recover (Pt'n. pp. 14, 15).

(6). Respondent's agreement to furnish the soil, and its provision that it must be of the kind described in Article 7 (R. 24) and Sec. 22-a, (R. 17) (the "Best Grade"

soil), resulted in a holding by the Court below that these two provisions placed an obligation on petitioner to select "satisfactory" soil (R. 40, 41).

This theory originated with the Court below, Respondent's contention throughout the progress of the work (Def's Ex. 52 A-D.; Appendix Reply Brf.), in its answer and on the trial having been that all the soil was "totally unfit", (R. 8-10; 32), and that Respondent was obliged to dry it and make it fit (P'tn. Note 21, p. 6), but petitioner could not select "satisfactory" soil from earth which was all so bad that it caused a loss of most of the first 160 days, and a loss of time every day; which was all so wet that pumps had to be operated continuously (Def's Ex. 52 A-D); and was all so unfit that second borings had to be made to determine whether it was physically possible to build the levee with it (R. 52). There is no evidence that the soil was mixed, part good and part bad, but all the evidence is that all the soil was bad (Pt'n. p. 4, Note 6).

Respondent does not support its present contention that the obligation to select "Best Grade" soil was that of petitioner by any decision or textbook authority. There is no such authority, and the contention is in conflict with the existing authorities, to wit,—Philadelphia Etc. R. R. Co. v. Howard, 13 How. 307 and McPherson v. San Joaquin, 124 Cal. xvii 56 p. 801 (Reply Brf. p. 18).

Moreover, generally speaking one in the position of a buyer as is petitioner is not obliged to select his material from a mass, which is peculiarly true here where the material was hidden underground, and so wet that pumps had to be operated continuously (Id. p. 17); (Norrington v. Wright, 115 U. S. 188).

Respondent's contention here that these two provisions placed no obligation on Respondent but wholly on petitioner emphasizes the vital importance of an authoritative construction of them by this Court for, until it is made, many contractors will fear such an interpretation as Respondent urges and bid an unjustifiably high price, even where there is an abundance of "Best Grade" soil, and contractors who rely upon such provisions as a warranty or condition precedent of the Government will, where the soil is as bad as it was here, be ruined through bids at a fraction of the value of the work (Reply Brf. p. 19).

7. The evidentiary findings of the Court below were in conflict with its ultimate finding:

The Court found the soil was wet and sloughy (R. 32, 33), and that the machinery which Respondent had approved was wholly insufficient and that the bad conditions required large additions thereto (R. 36); and that "any sort of investigation * * * would have shown * * *" "that he" (Petitioner) "would probably encounter wet soil, that it is not unusual to encounter cypress stumps; and that such stumps are frequently found in that section * * *" *(Id.* 41); and that "plaintiff ran into many difficulties in handling the soil * * *, encountering cypress stumps and other organic matter, which caused damage to his machinery. He also had difficulty with sloughs and slides". (Opinion, R. 39).

It is impossible to reconcile these findings with the conclusion that the soil was "satisfactory". To whom was it satisfactory? Certainly not to Respondent; it spent all the time the work was being done in preparing the Daily Reports, showing the unfit condition of the soil and in

compiling from them and presenting 107 notices that it was wet and unfit and interposed an answer that it was mostly "totally unfit". (R. 33, 10.) And no one could think that it was "satisfactory" to petitioner who lost half the time he worked through its destructively bad condition and was ruined and forced into bankruptcy by it. It was "satisfactory" to neither of the parties of the contract,—the only ones interested and to be satisfied.

Moreover the contract provides that soil of the kind Respondent provided,—wet and sloughy and pervaded with foreign matter including cypress trees, could not be used (R. 24, 17, 18), and therefore it could not be satisfactory.

Petitioner was entitled to the contrary finding,—just as Respondent pleaded and proved,—that the soil was "totally unfit" (R. 10, Def's. Ex. 52 A-D, Appendix Reply Brf.), and the "judgment in point of law is not sustainable". (U. S. v. Esnault-Pelterie, 300 U. S. 26, 31.)

Respondent's failure to furnish fit soil is emphasized and made even more clear than through its Daily Reports (Appendix, Reply Brf.) by the two circumstances, —that the officer in charge knew that there were cypress stumps (R. 53), and the new contractor received 18.60,— 50% more than petitioner through misrepresentations was induced to bid, and took 50% more than the time limit fixed by his contract. (R. 51, 56; Reply Brf. p. 5.)

8. *Respondent throughout petitioner's work arbitrarily ignored its agreement to furnish "Best Grade" soil, and its implied obligation to furnish fit soil and through duress required petitioner to accept "totally unfit" soil, and on 107 occasions by harassing notices sought to impose on him*

the task of putting such "totally unfit" soil into suitable condition (R. 32, 33,) which entitled and forced petitioner to abandon the contract and recover the value of his work.

Petitioner was entitled to recover because,—

(a) Respondent's officer in charge maintained throughout the progress of the work an arbitrary and unjustifiable position in requiring petitioner to accept unfit soil, and make it fit, despite petitioner's repeated appeals and protests to him and requests to shut down[1]. (R. 45, 48, 49; Plf's. Ex. 37), whereas petitioner's sole obligation was to take the soil from the pits and place it on the levee in the ordinary manner[2].

NOTE 1.

"The contention" (that the contractor was bound by certain contract provisions) "overlooks the view of the contract entertained by Colonel Lydecker, and the uselessness of soliciting or expecting any change by him. His conduct, to use counsel's description, 'though perhaps without malice or bad faith in the tortious sense' was repellent of appeal or of any alternative but submission with its consequences. And, we think, against the explicit declaration of the contract of the material to be excavated and its price." U. S. v. Smith, 256 U. S. 11, 16.

[2] "Where goods or machinery are ordered for a particular use to the knowledge of the manufacturer or vendor, there is an implied undertaking or warranty on his part that they will be fit for such use in the ordinary manner, * * *." Bentley v. State, 73 Wis. 416, 41 N. W. 338, approved in Spearin v. U. S., 248 U. S. 132, 137.

"As to the claim for $750, the 'special castings' were to be supplied by the defendant, * * * the castings, when furnished * * * were defective in size; and expense and delay ensued in remedying the defects, causing a damage to the plaintiffs, as alleged, of $750. The defendant contends that the clause * * * that the plaintiffs 'shall have no claim upon the city for any delay in the delivery of * * * materials * * * throws the loss * * * on the plaintiffs. But we do not so think. * * *.' The size of the valve boxes is not mentioned in the contract, nor their costs. They were, therefore, to be of the usual size and cost. The trustees afterwards required the valve boxes to be of a size which made them cost $3 more each than those of the usual size would have cost. This was a change of plan, and the increased work caused by it is agreed to be paid for, but there is no contract rate for the work of the class. The item of $447 seems to be recoverable." Wood v. Fort Wayne, 119 U. S. 312.

See also McPherson v. San Joaquin Co., 124 Cal. xvii, 56 P. 802; 13 C. J. § 522, p. 460; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108; Board of Directors v. Roach, 174 F. 949, 953; Cotton Co. v. U. S., 87 Ct. Cls. 563.

(b) The compelling petitioner to attempt to make the unfit material fit

> "was an exercise of superintendence and unwarrantable superintendence." (U. S. v. Barlow, 184 U. S. 123.)

(c) The conduct of the officer in charge in ignoring and persistently misconstruing Respondent's obligation to furnish fit soil, and mistakenly insisting that petitioner was bound to make the bad soil fit, amounted to duress:

> "We cannot ignore the suggestion of duress there was in the situation, or the questionable fairness of the conduct of the government, aside from the illegality of the construction of the contract insisted on, * * *." (Freund v. U. S., 260 U. S. 60, 70.)

9. *There is no real dispute concerning questions of fact herein, but only questions of law in construing the contract and specifications, and, therefore, no appeal was necessary under Article 15, or otherwise, in the contract.* (See Reply Brf. ps. 21, 22.)

As shown above, there was no finding of fact made by the contracting officer that there was fit or "Best Grade" soil, despite petitioner's repeated protests and appeals, but all the evidence shows that the soil was unfit, sloughy, with hidden cypress trees and foreign matter (Def's Ex. 52 A-D; Ptn. p. 4, Note 6; Reply Brf. ps. 2-5). So there was no dispute as to the above facts, but only the questions of law in construing Article 7 of the contract (R. 24), and Sec. 22-a of the Specifications (R. 17),—whether respondent in agreeing to furnish the soil breached the contract in violation of the above provisions in furnishing unfit soil, or its implied warranty to furnish fit soil. The decisions upon questions of law are reviewable by the Court. U. S. v. Laughlin, 249 U. S. 440, 443; Dismirke v. U. S., 297 U. S. 167; U. S. v. Compagnie Gen. Tran., 26 F. 2d 195, 198.

For all the foregoing reasons, including those set forth in the Petition and Reply Brief, petitioner urges that this Petition for a Rehearing, and Writ of Certiorari, be granted.

Respectfully submitted,

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S. Wallace Dempsey, counsel for the above named petitioner, does hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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